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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FUNDACION EDUCATIVA ANA G. MENDEZ,
JOSE F. MENDEZ, *et al.*,

Petitioners,

—VS.—

ARSENIO E. SUAREZ, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

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QUESTIONS PRESENTED

1. May the courts of Puerto Rico create a new exception to the Federal preemption doctrine by awarding damages to unlawful strikers who violated the National Labor Relations Act ("the Act"), and ordering their reinstatement contrary to an order of the National Labor Relations Board ("NLRB"), thereby penalizing their former employer for taking action that the NLRB has determined is permitted by the Act.

2. Does Federal preemption preclude the courts of Puerto Rico from applying local law, after a collective bargaining agreement has terminated, to revive and enforce the employment rights, and to direct the reemployment of strikers who lost their status as employees pursuant to Section 8(d) of the Act by engaging in an unlawful strike, when the NLRB has determined that their former employer had no obligation to reemploy them.

PARTIES

The petitioners are Fundacion Educativa Ana G. Mendez ("the Foundation"), and Jose F. Mendez, Manuel A. Garcia Mendez, Juan M. Garcia Passalacqua, Nydia Velez de Rios, Andres Gomez, Guillermo Irizarry, Luis Colazo Perez, Pedro Rivera Cassiano, Maria Socorro Lacot, Rafael Rodriguez, Florencio Pagan Cruz, Armando Figueroa Toro and Nelson Fernandez Blasini, members of the Board of Directors of the Foundation. The Foundation has no parent company, and no affiliates or subsidiaries.

Respondents are Arsenio E. Suarez, Diana Ayguabibas, Ruth Cosme, Bertha Gallego and Vivian Roura.

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Petitioners, Fundacion Educativa Ana G. Mendez ("the Foundation"), *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Puerto Rico entered on January 18, 1983.

OPINIONS BELOW

The judgment of the Supreme Court of Puerto Rico, not reported, is reprinted as Appendix A hereto. It affirms, as modified, a decision of the Superior Court of Puerto Rico, also not reported, which is reprinted as Appendix C hereto.

JURISDICTION

The judgment of the Supreme Court of Puerto Rico issued on January 18, 1983. The jurisdiction of the Court to review the judgment on petition for certiorari rests upon 28 U.S.C. § 1258(3).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act ("the Act"), as amended, (29 U.S.C. §§ 151 *et seq.*) are reprinted as Appendix I hereto.

STATEMENT OF THE CASE

The Foundation is a non-profit educational foundation. It directs and operates the Puerto Rico Junior College ("the College"), a two-year educational institution at the university level.

Respondents were members of the faculty of the College and belonged to a union of university teachers, the Associacion de Maestros Universitarios ("the Association"). The Association was first certified by the NLRB as the exclusive representative of the faculty members of the College on January 30, 1975.

Prior to that date, the terms and conditions of employment of faculty members at the College were governed, in part, by the Statutes and Regulations of the College ("the Statutes"), which had been adopted by the Board of Directors of the Foundation. Upon certification of the Association as the exclusive bargaining representative of the faculty, the Foundation became obligated, by virtue of Section 8(a)(5) and (d) of the Act, to bargain in good faith with the Association over the provisions of the Statutes relied upon by respondents in this action. Thus, the Foundation and the Association were free, through the collective bargaining process, to agree to eliminate those provisions, to continue them in effect or, as they did, to modify them. The parties did bargain over and reach agreement on that subject and many others.

Their agreement covered the period from November 1, 1975 through October 31, 1978. It established a "just cause" standard for the revocation of tenure, and required adherence to certain of the procedures set forth in the Statutes prior to the discharge of a tenured teacher. (App. H at 63a) In contrast to the Statutes, under which the decision of the College with

respect to such discharges was final, the collective agreement provided that each tenured teacher whose employment was terminated would, through the Association, have direct resort to the grievance and arbitration procedure set forth in the collective agreement. (App. H at 63a)[1]

Prior to October 31, 1978, the Foundation and the Association entered into collective negotiations for a new agreement. During the course of the bargaining, and without giving the notices mandated by Section 8(d) of the Act, 29 U.S.C. § 158(d), the Association instituted an unlawful strike to exert economic pressure on the Foundation. It is undisputed that respondents participated in the strike.

The strike began on April 25, 1979. The next day, the Foundation filed a charge with the NLRB, alleging that the Association had violated Section 8(d) by failing to provide the requisite notice of their intention to strike and by engaging in a strike before the expiration of the mandated sixty-day waiting period. In light of their participation in this unlawful conduct, respondents' employment with the Foundation was terminated.

On May 7, 1979, the Association filed a charge with the NLRB, alleging, *inter alia,* that the Foundation had violated the Act by locking out respondents and other strikers and by refusing to reinstate them after their participation in the strike. Shortly thereafter (on May 24, 1979), the respondents and others commenced an action in the Superior Court of Puerto Rico, San Juan Section, alleging that, as a matter of Puerto Rican law, the termination of their employment—their loss of

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1 Articles VII, XXI and XXII of the collective agreement are reprinted as Appendix H hereto. Article XXI, § 3(f) states: "Complaints arising as a result of the termination . . . of an employee . . . shall be submitted by the Union directly to the Grievance Committee. . . ." (App. H at 70a) Although the Foundation took the position that the arbitration clause did not apply to disputes arising after the expiration of the agreement, the grievance procedure remained in effect and was utilized after the contract expired.

status as employees—had been wrongful.[2] Respondents did not rely upon the collective agreement. Rather, they asserted that the Statutes of the College constituted an employment contract between them and the Foundation, and alleged that the Foundation had, as a matter of Puerto Rican law, breached this alleged contract by dismissing them without a prior hearing.[3] (App. G at 55a)

Although the strikers conceded in their complaint that they had engaged in the strike for which they had been terminated, they demanded reinstatement to their former positions and damages of $14,000,000. (App. G at 57a)

On July 20, 1979, following the completion of the NLRB's investigation, the Regional Director of the NLRB concluded that the strike violated Section 8(d) of the Act. The Regional Director ruled further that, by engaging in such unlawful conduct, respondents had "lost their status as employees and therefor, the protection of Section 8(a) of the Act," and that the Foundation "was under no obligation to reemploy [them]." (App. D at 20a) He also ruled that because respondents had lost their employment status, the Foundation did not violate Section 8(a)(5) of the Act by unilaterally changing working conditions. (App. D at 20a) Accordingly, the Regional Director refused to issue a complaint against the Foundation.

The Association appealed to the General Counsel of the NLRB the Regional Director's refusal to issue a complaint on the charge. On September 28, 1979, the General Counsel

2 Suit was brought by over thirty strikers. Settlements not providing for reinstatement have been reached with most of them. Only five remain as respondents in this action, all of whom admittedly participated in the unlawful strike. (App. G at 55a)

3 That respondents seek to enforce an alleged private contract with the Foundation is confirmed by the Response to Petitioner's Application for Stay of Mandate, in which respondents rely only upon the Statutes; no reference is made to the collective agreement; the action is described as "alleging a breach of contract . . ."; and the decision below is characterized as doing "no more than discuss[ing] the interpretation of the private contract provisions between the parties . . . ." (Response to Application for Stay of Mandate, ¶¶ 4, 5, 7 and 11)

upheld the Regional Director's determination. (App. E at 21a) The decision of the General Counsel denying the Association's request to issue a complaint constitutes a final and unappealable order of the NLRB.

The NLRB also investigated the charge filed by the Foundation (alleging that the strike was in violation of Section 8(d) of the Act) and another charge filed by the Association arising out of the collective bargaining. On August 3, 1979, the Regional Director issued an Order Consolidating Cases, Complaint and Notice of Hearing. The Consolidated Complaint alleged that the Foundation had violated Sections 8(a)(5) and 8(a)(1) by unilaterally terminating the existing faculty evaluation procedure and otherwise refusing to bargain in good faith with the Association. However, it did not allege that the Foundation had violated the Act by terminating respondents' employment without a hearing. Nor did it allege that the Foundation was under any obligation to reemploy the discharged strikers. To the contrary, the Consolidated Complaint alleged that the strike violated Section 8(d) and was, therefore, unlawful.

Upon the completion of the hearing on the Consolidated Complaint, the Administrative Law Judge concluded, on February 20, 1981, *inter alia*, that by engaging in a strike to compel a modification of the existing contract, without first having complied with Section 8(d), the Association had violated Sections 8(b)(3) and (d) of the Act. (App. F at 36a) The NLRB affirmed the decision of the Administrative Law Judge on October 12, 1982. *Fundacion Educativa Ana G. Mendez*, 265 N.L.R.B. No. 3 (1982), *petitions for review pending*, No. 82-1848 and No. 82-1876 (1st Cir. 1982).

Approximately fourteen months after the decision of the Administrative Law Judge, a hearing was held before the Superior Court of Puerto Rico, San Juan Section, on the parties' motions for summary judgment in the civil action commenced by respondents and others.[4] Despite the prior

4 By timely motion to dismiss and/or for summary judgment, the Foundation raised its defense that the preemption doctrine precluded the Puerto Rican courts from asserting jurisdiction over the action.

determination of the NLRB, which was relied upon by petitioners, that the strikers had lost their status as employees and were not entitled to reemployment, the court, applying Puerto Rican contract law, declared their discharges null and ordered their reinstatement with back pay.[5] (App. C at 17a)

The Superior Court noted that the Statutes relied upon by the strikers were incorporated into the collective agreement and that, under that agreement, affected teachers were afforded a right to challenge the termination of their employment by means of the grievance and arbitration procedure set forth in the agreement. Although the court also ruled that the collective agreement "had come to an end" (App. C at 13a), it nonetheless concluded that respondents were entitled, under the Statutes of the College, to a preferment of charges and a hearing prior to the termination of their employment because the Statutes survived the expiration of the collective agreement.

In so concluding, the Superior Court summarily rejected petitioners' jurisdictional defense that federal law and labor policy preempted the courts of Puerto Rico from so ruling on respondents' claims: "The courts may entertain a claim filed against an employer by his employees claiming responsibility for conduct that does not include the violation of labor laws." (App. C at 14a) It did so without citation to any of the decisions of this Court concerning the labor preemption doctrine.

On June 29, 1982, the Supreme Court of Puerto Rico dismissed the Foundation's appeal on the ground that it did not raise a substantial constitutional question. (App. B at 5a)

The Foundation filed a motion for reconsideration before the Supreme Court of Puerto Rico urging that the Superior Court had invaded the primary jurisdiction of the NLRB, improperly created a new exception to the doctrine of labor law preemption, and erred in enforcing so-called individual

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5 The Superior Court found that respondents' claims for "moral damages" were not established and dismissed those claims, which are not at issue here. (App. C at 17a, n.14)

employment contracts that had been superseded by the collective agreement. (App. A at 2a) On October 7, 1982, the Supreme Court of Puerto Rico issued the writ of review. The judgment reviewed was modified to order that the salaries, if any, earned by the teachers from other sources during their period of unemployment, be deducted from their corresponding back pay. As modified, the judgment below was affirmed over a dissent by Justice Frank Rebollo Lopez without opinion. (App. A at 4a)

Citing only *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) on the preemption question, the entire reasoning of the court was contained in two paragraphs:

> There is a notable difference between the action on contract filed with the Court, and the complaint filed before the N.L.R.B for unfair labor practices (refusal to bargain the evaluations for tenure and other particulars), thus the Superior Court's intervention does not preempt the field reserved to the Board.
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> * * *
>
> Neither were the plaintiffs bound to exhaust the grievance procedure insofar as the Foundation dismantled said forum upon unilaterally abolishing arbitration.
>
> The termination of the collective bargaining agreement did not necessarily abrogate the guaranties offered by the Statutes of the Junior College regarding faculty tenure. Some prior agreements subsist that are not incompatible with the collective bargaining agreement. *J.I. Case* v. *N.L.R.B.*, 321 U.S. 332 [3] These prior agreements—contained in statutes and regulations—that guaranteed fair treatment both to the Association's members and to nonunion personnel, are still in force with the basic protection given to *all*, thus there was no substitution or novation of the same when the collective bargaining agreement was executed.

(App. A at 2a-3a)

REASONS FOR GRANTING THE WRIT

The Supreme Court of Puerto Rico applied local law to decide the legality of action taken by the Foundation after the expiration of the collective bargaining agreement and while the Foundation and the Association were obligated, as a matter of federal law, to negotiate in good faith toward a new agreement. Having decided that the action was wrongful, it awarded damages to illegal strikers who had violated Section 8(d) of the Act, thereby penalizing their former employer for conduct that the NLRB had determined was permitted by the Act. At the same time, it effectively nullified an order of the NLRB by affirming an order restoring respondents to their status as employees of the Foundation. There could be no clearer interference with the regulatory scheme embodied in the Act.

By validating conduct prohibited by the Act, penalizing employer conduct permitted by the Act, and granting remedies in direct conflict with the purposes of the Act, the decision below frustrates the purposes of the Act and violates the preemption doctrine.

I. The Decision Below Raises an Important and Substantial Question Which Has Not Been, but Should Be Decided by This Court.

This case raises an important question concerning the authority of the Supreme Court of Puerto Rico, and state courts generally, in effect, to overrule the federal agency invested by Congress with the primary authority to interpret and enforce the national labor laws and regulate the bargaining process. It involves a direct and immediate conflict between a Puerto Rican court's order directing the reinstatement of respondents and a determination by the NLRB that they need not be reemployed because they have engaged in conduct in violation of the Act. Thus, the decison below endangers one of the basic principles upon which the doctrine of federal preemption rests, *i.e.*, that potentially conflicting rules of law, remedy and administration cannot be permitted to operate.

This case also raises an important, closely related question concerning the authority of the Supreme Court of Puerto Rico, and state courts generally, to regulate the respective rights and obligations of employers and employees covered by the Act during any hiatus that might occur between the expiration of a collective agreement and the execution of a successor contract—a field that has been occupied and is pervasively regulated by federal labor law. The conflict between the judgment of the Supreme Court of Puerto Rico and the federally mandated and regulated collective bargaining process (over which the NLRB has exclusive jurisdiction) is one of pervasive and substantial proportions. It calls for this Court to settle the important question whether illegal strikers, whose conduct has disrupted the collective bargaining process, may further subvert and circumvent that process by resorting to local courts to revive an alleged contractual right that preexisted and was superseded by the collective agreement.

A. The Conduct Regulated and the Field Entered by the Court Below

The judgment below demonstrates a fundamental misunderstanding of national labor policy and of the federal regulatory scheme.[6] Indeed, it treats the important federal question before

6 The principal thrust of national labor policy is "the promotion of collective bargaining. . . ." *Local 24, Int'l Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 295 (1959). Toward that end, Congress protected employee rights to bargain collectively through representatives freely chosen (29 U.S.C. § 157); provided that the representative selected by a majority of employees in a bargaining unit "shall be the exclusive representative of all the employees" in that unit for purposes of collective bargaining (29 U.S.C. § 159); and prohibited employers from circumventing or disparaging the collective bargaining process by dealing directly with individual employees (*Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944)) or by making unilateral changes in terms and conditions of employment (*NLRB* v. *Katz*, 369 U.S. 736 (1962)).

Also part of the federal scheme is Section 301 of the Act, 29 U.S.C. § 185, which recognizes the collective agreement reached through the bargaining process as an enforceable contract binding on both parties.

it so cursorily and with such disregard for the federal interests at stake that it invites summary reversal. Certainly, like the decision unanimously reversed by this Court in *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979), it demonstrates a compelling need for guidance from the Court.

As the Supreme Court of Puerto Rico apparently failed to recognize, federal labor law does more than simply regulate the bargaining process during the negotiation of an initial agreement and, if an agreement is reached, provide for its enforceability during the term of the agreement. It also comprehensively regulates the respective rights and obligations of employers, employees and employee representatives after the expiration of a collective agreement, during any hiatus that might occur between the expiration of one agreement and the execution of a successor agreement.[7] It is the conduct of an

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Textile Workers Union of America v. *Lincoln Mills*, 353 U.S. 448 (1957). In order to ensure the uniformity deemed essential to national policy, this Court held that suits under Section 301, whether brought in federal or state court, must "be decided according to the precepts of federal labor policy." *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962). Further, a defendant sued in state court for breach of a collective agreement may remove the action to federal court. *Avco Corp.* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968). *See also Volkswagen de Puerto Rico, Inc.* v. *Puerto Rico Labor Relations Board*, 454 F.2d 38 (1st Cir. 1972) (holding that proceedings before Puerto Rican Board for breach of a collective agreement between parties covered by the NLRA are removable to federal court).

7 In order to promote collective bargaining and the peaceful resolution of disputes, Section 8(d) of the Act regulates the use of strikes and lockouts during the hiatus period and mandates a sixty-day "cooling-off period during which differences might be discussed, mediated and resolved." *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 301 (1957). Section 8(d) "also warns employees that, if they join a proscribed strike, they shall thereby lose their status as employees and, consequently, their right to reinstatement." *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 286 (1956).

The duty of employers and employee representatives to bargain in good faith over terms and conditions of employment continues after the expiration of the collective agreement and even in the event of a

employer vis-a-vis its employees during that period that the court below sought to regulate.

Although a collective agreement may, by its terms, have expired, federal law gives continuing effect to at least some of the provisions of the expired agreement in order "[t]o protect the integrity of the collective bargaining process. . . ." *Carpenter Sprinkler Corp.* v. *NLRB*, 605 F.2d 60, 65 (2d Cir. 1979). Which provisions remain in effect, under what circumstances, for how long, and whether they may be enforced in arbitration are matters to be decided by the NLRB in an unfair labor practice proceeding or, if an action is brought under Section 301 of the Act to enforce the collective agreement, by a federal or state court—applying substantive federal labor law. *Nolde Bros., Inc.* v. *Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977); *Cooper v. General Motors Corp.*, 651 F.2d 249 (5th Cir. 1981); *Washington-Baltimore Newspaper Guild, Local 35* v. *Washington Post Co.*, 442 F. Supp. 1060 (D.D.C. 1977).[8]

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strike. *NLRB* v. *Ramona's Mexican Food Products, Inc.*, 531 F.2d 390 (9th Cir. 1975); *J.H. Bonck Co.*, 170 N.L.R.B. 1471, 1479 (1968), *enf'd*, 424 F.2d 634 (5th Cir. 1970); *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 245 F.2d 594 (5th Cir. 1957). Generally, when a collective agreement expires, the provisions governing terms and conditions of employment survive the expiration of the agreement and "an employer may not unilaterally alter, without bargaining to impasse, a contractual term that is a mandatory subject of bargaining." *NLRB* v. *Haberman Construction Co.*, 618 F.2d 288, 302-03 (1980), *mod. on other grounds on reh. en banc*, 641 F.2d 351 (5th Cir. 1981); *see also Carpenter Sprinkler Corp.* v. *NLRB*, 605 F.2d 60 (2d Cir. 1979); *AFTRA* v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Such unilateral changes constitute a violation of Section 8(a)(5) of the Act. *NLRB* v. *Katz*, 369 U.S. 736 (1962).

8 In such an action, the court may enforce duties imposed on an employer by the collective agreement. It may not decide whether a unilateral change in terms or conditions of employment is an unfair labor practice, for the NLRB has "exclusive jurisdiction to prevent unfair labor practices . . . and . . . the jurisdiction of the . . . courts [under Section 301 of the Act] is confined to 'suits for violation of contracts between an employer and a labor organization'. . . ." *Proc-*

It is into this field—fully occupied and regulated by federal law—that the courts of Puerto Rico have intruded, ignoring the delicate balance struck by Congress—between the competing interests of unions, employees, employers and the community—in designing a complex scheme of protected, prohibited and permitted activity. The Puerto Rican Supreme Court's treatment of the collective agreement as having come "to an end" was mechanical and in conflict with federal law as developed by this Court and the NLRB; its consideration of the federal interests at stake and of the scope of NLRB jurisdiction was narrow and superficial. It is not surprising, therefore, that its decision directly conflicts with and frustrates national labor policy in substantial and important ways.

B. The Conflict Between the Decision Below and Federal Labor Policy

Over the past two decades, the Court has articulated and refined two principal branches of the labor preemption doctrine:

(i) "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted" (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959)); and

(ii) even if the conduct in question is neither protected nor prohibited by the Act, state regulation is precluded where Congress has occupied the field and "intended that the conduct involved be unregulated

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ter & Gamble Independent Union v. *Procter & Gamble Mfg. Co.*, 312 F.2d 181, 190 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963). *See also Int'l Union, United Automobile Workers of America* v. *Atlas Tack Corp.*, 590 F.2d 384 (1st Cir. 1979) (holding that federal court has no jurisdiction under Section 301 to prevent unilateral termination of pension plan when collective bargaining agreement of which the pension plan was a part has expired).

> because left 'to be controlled by the free play of economic forces' " (*Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976), quoting from *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

Both branches are "designed to shield the system from conflicting regulation of conduct." *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971).

Regardless which branch of the preemption doctrine is applied, the local regulation at issue here is precluded because it would negate the exclusive jurisdiction of the NLRB and frustrate the purposes of the Act.

1. The decision below effectively nullifies a final order of the NLRB. This is not, therefore, a case in which it is necessary to consider whether conflict or interference is "threatened." Here, the conflict of remedies is actual and direct. The NLRB has determined that the Foundation had no obligation to reemploy the respondents. The Supreme Court of Puerto Rico has ordered their reinstatement. Nor is it necessary to consider whether the Foundation's action in terminating respondents' employment was "arguably" protected or permitted by the Act, for the NLRB has determined that it was actually permitted.

Congress has declared that an employee who engages in a strike in violation of Section 8(d) "loses his status as an employee . . . for the purposes of Sections 158 to 160 of this title [unless and until] he is reemployed. . . ." 29 U.S.C. § 158(d). It cannot reasonably be disputed that Congress, when it enacted Section 8(d), contemplated and intended that employers would have the right to discharge unlawful strikers. *See United Furniture Workers* v. *NLRB*, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 379 U.S. 838 (1964).

Indeed, despite the strong federal policy favoring free collective bargaining and the arbitration of disputes under collective

agreements, the First Circuit, although leaving the question open, has expressed "doubt" as to "whether discharges occasioned by a violation of section 8(d) and, therefore, cloaked in the protection afforded by that section must be arbitrated"; and Chief Judge Aldrich, concurring, specially noted that the court was not deciding "whether . . . it would be contrary to the provisions of the Act to foreclose by contract an employer's right to take the action contemplated by section 8(d)(4)." *Trailways of New England, Inc.* v. *Amalgamated Ass'n of Motor Coach Employees,* 343 F.2d 815, 818, 819 (1st Cir.), *cert. denied,* 382 U.S. 879 (1965).

Respondents engaged in strike activity that was not only unprotected but prohibited by the Act. The Association invoked the processes of the NLRB alleging that the dismissal of respondents and others violated the Act. But, the NLRB determined, as a matter of federal law, that the strike was unlawful, that respondents had lost their status as employees of the Foundation and that the Foundation had no obigation to reemploy them.

It is against that background that respondents sought to invoke local law to revive their employment status, and the courts of Puerto Rico awarded them damages and ordered their reinstatement. "There is simply no question that the Act's processes would be frustrated in the instant case were [Puerto Rico's] ruling permitted to stand." *Machinists* v. *Wisconsin Employment Relations Comm'n, supra,* 427 U.S. at 148.

2. The decision below also frustrates national policy by upsetting the balance of economic weapons available to labor and management and by burdening conduct permitted by the Act. The states are preempted from regulating conduct which, although neither specifically protected nor prohibited by the Act, was intended by Congress to be left unregulated. *Local 20, Teamsters* v. *Morton,* 377 U.S. 252 (1964). This is so because "the use of economic pressure . . . is part and parcel of the process of collective bargaining" (*NLRB* v. *Insurance Agents' Int'l Union,* 361 U.S. 477, 495 (1960)), and because it

was the intent of Congress in enacting a comprehensive body of laws regulating labor relations, to carve out a broad area where the resolution of disputes would be left to the interplay of economic weapons and other self-help measures available to both labor and management (*American Shipbuilding Co.* v. *NLRB,* 380 U.S. 300, 314-16 (1965)).

Thus, in *Teamsters* v. *Morton*, 377 U.S. 252, 259 (1964), the Court held that the award of damages, under state law, based on a union's exercise of a self-help weapon permitted by federal law could not stand because that self-help weapon "formed an integral part of the [union's] effort to achieve its bargaining goals . . ." and "[a]llowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community." Similarly, in *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), the Court held that a concerted refusal to work overtime, which the NLRB had ruled did not violate the Act, was privileged against state regulation. Citing *NLRB* v. *Insurance Agents' Int'l Union*, *supra*, the Court stated that "neither States nor the Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful.' " 427 U.S. at 149. The state order enjoining the activity was preempted because it would deny to " 'one party to an economic contest a weapon that Congress meant him to have available.' " 427 U.S. at 150.

This Court has recognized that discharge for strike activity not protected by the Act is a self-help measure available to employers and can play a significant role in the bargaining process.[9] As such, it is privileged against state regulation for the very reasons enunciated by the Court in *Teamsters* v. *Morton* and *Machinists* v. *Wisconsin Employment Relations Comm'n*, *supra*. The use of that self-help measure in the

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9 *See Machinists* v. *Wisconsin Employment Relations Comm'n, supra*, 427 U.S. at 148 n.9; and *NLRB* v. *Insurance Agents' Int'l Union, supra*, 361 U.S. at 495.

circumstances present in this case presents even more compelling reasons for preemption because its use is sanctioned by Section 8(d) of the Act. *See Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235 (1967).[10]

The decision below plainly frustrates national labor policy by interfering with a privilege afforded the Foundation under federal law. Absent a clear indication of Congressional intent to the contrary (*see New York Telephone Co.* v. *New York State Dep't of Labor*, 440 U.S. 519 (1979)), state action which burdens a privilege accorded to labor disputants under federal law frustrates national labor policy and cannot be allowed to stand.

3. The court below invaded the primary jurisdiction of the NLRB by regulating conduct governed by Section 8 of the Act. This is so whether the conduct regulated is defined as the termination of respondents' employment or as the failure to provide respondents with a hearing prior to dismissal. That such regulation is impermissible was recently reaffirmed by the Court in *Local 926, Int'l Union of Operating Engineers* v. *Jones*, No. 81-1574 (U.S. April 4, 1983), slip. op. at 11 ("Matters within the exclusive jurisdiction of the Board are normally for it, not a state court, to decide.").

The NLRB not only decided that the termination of respondents' employment was lawful because they had lost their status as employees by engaging in a strike in violation of Section 8(d), but also that, because of such loss of status, unilateral changes in their terms and conditions of employment

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10 *See also U.S. Chamber of Commerce* v. *New Jersey*, 89 N.J. 131, 445 A.2d 353 (N.J. 1982) (state statute prohibiting recruitment and hiring of strike replacements is preempted because it interferes with the balance of economic power between labor and management); *People* v. *Federal Tool & Plastics*, 62 Ill. 2d 549, 553-54, 344 N.E.2d 1, 3-4 (Ill. 1975) (state statute requiring notice to prospective replacements is preempted; it burdens employer's right to obtain strike replacements and upsets balance of economic power intended by the Act).

did not violate Section 8(a)(5) of the Act.[11] Admittedly, the NLRB was not presented with and did not decide the precise question whether the Foundation violated Section 8(a)(5) by failing to hold hearings prior to the dismissals. It is, therefore, not entirely clear how that question would have been resolved by the NLRB. What is clear is that the controversy could have been presented to the Board, and that the failure to hold hearings prior to the dismissals is either prohibited or permitted by Section 8 of the Act. *See NLRB* v. *Katz*, 369 U.S. 736 (1962); *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949). Whether it is prohibited is a decision for the NLRB in the first instance. As the Court noted in *MEBA* v. *Interlake Steamship Co.*, 370 U.S. 173, 185 (1962): "While the Board's decision is not the last word, it must assuredly be the first."

The court below apparently viewed this well established principle as inapplicable because the action before it was one "on contract. . . ." (App. A at 2a) However, even if so, and even if the question could be presented to the courts as a contractual matter in the first instance, it would have to be presented under Section 301 of the Act, and decided under federal substantive law. *Cf. Trailways of New England, Inc.* v. *Motor Coach Employees*, 343 F.2d 815 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965). Yet, respondents did not seek enforcement of the collective agreement or an order, pursuant to Section 301, compelling arbitration. If they had, their claims would have been governed by federal substantive law.

4. The decision below circumvents and subverts substantive principles of federal labor law by permitting respondents to assert, under local law, an alleged contractual right that exists—if at all—only by virtue of the collective agreement. The asserted right to a hearing prior to the termination of employment is, by virtue of its incorporation into the collective agreement, a creature of federal law. It is, therefore, governed

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11 The Regional Director's decision states: "as the strikers' employment status lawfully terminated, [the Foundation] did not, as alleged, violate Section 8(a)(5) of the Act . . . by unilaterally changing working conditions." (App. D at 20a)

by substantive principles of federal labor law. *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). Thus, its substance and effect must be determined not according to local rules of decision, but according to federal law. *See, e.g., Cooper* v. *General Motors Corp.*, 651 F.2d 249 (5th Cir. 1981) (applying federal law to determine whether seniority rights created by an expired collective bargaining agreement survive the expiration of the agreement). And, if such a right remained in effect, its continuing effect was solely by virtue of federal labor law.

Substantive federal law also governs the question whether respondents have a cause of action against the Foundation for wrongful discharge.[12] And, if respondents sought (as they have not), an order, pursuant to Section 301 of the Act, compelling arbitration, the same would be true with respect to the question whether the Foundation was obligated to arbitrate dismissals that occurred after the expiration of the collective bargaining agreement. *Nolde Brothers, Inc.* v. *Bakery Workers*, 430 U.S. 243 (1977); *Trailways of New England, Inc.* v. *Motor Coach Employees*, 343 F.2d 815 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965).

In effect, the court below, while ignoring the balance of the collective agreement and the existence of a collective bargaining relationship, declared that, under local law, the term referring to the Statutes relied upon by respondents—and only that term—has continuing effect beyond the expiration date of the agreement. In so doing, the court circumvented the substantive prerequisites, under federal law, to a Section 301 action.

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12 Under federal law, even if wrongfully discharged, an employee may bring an action against his employer in the face of a failure to exhaust contractual remedies only if he "can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." *Vaca* v. *Sipes*, 386 U.S. 171, 186 (1967). *See also Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); and *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965).

II. The Court Below Misconstrued the Applicable Decisions of This Court.

The opinion below is at war with the decisions of this Court teaching that the labor preemption doctrine "is designed to shield the system from conflicting regulation of conduct";[13] that "[i]t is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern";[14] that the inquiry to be undertaken by the court is not a narrow or technical one, but rather whether "Congress occupied [the] field and closed it to state regulation";[15] and that "a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation" is required.[16]

The court below purported to apply the *Garmon* rule in deciding whether this action is preempted. This Court, in *Local 926* v. *Jones,* No. 81-1574 (U.S. April 4, 1983), recently restated the framework and principles for applying that rule: (i) if "the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA . . . otherwise applicable state law and procedures are ordinarily preempted" (slip op. at 6); (ii) further analysis is not required unless "the conduct at issue is only a peripheral concern of the Act or touches on interests . . . deeply rooted in local feeling and responsibility . . ." (*id.*); and (iii) even if the state interest is a deeply rooted one, "[t]he question of whether [state] regulation should be allowed . . . involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting

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13 *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971).

14 *Id.*

15 *Teamsters* v. *Morton*, 377 U.S. 252, 258 (1964), quoting from *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 457 (1950).

16 *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 300 (1977).

substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens" (*id.* at 7).

Although giving token acknowledgement to these principles, the Supreme Court of Puerto Rico misconstrued the Court's decision in *Sears, Roebuck & Co.* v. *Carpenters,* 436 U.S. 180 (1978), as dramatically narrowing their scope. The Court cited *Sears* for the proposition that

> "[t]he critical inquiry is . . . whether the controversy presented to the state court is *identical* to or different from that which could have been, but was not, presented to the National Labor Relations Board. . . ."

(App. A at 2a-3a)

The court below did not, however, undertake the very inquiry that it recognized as "critical." To the contrary, in its *ratio decidendi* it examined only one of the controversies actually submitted to the NLRB (*i.e.*, "refusal to bargain the evaluations for tenure and other particulars") (App. A at 2a) and failed to consider the unfair labor practice charge alleging that the Foundation's dismissal and refusal to reemploy respondents had violated the Act. Only by so doing could the court avoid acknowledging that the very controversy before it—the legality of the termination of respondents' employment—not only could have been, but was presented to and decided by the NLRB. (App. D at 19a and App. E at 21a)[17]

In any event, the court below misread *Sears,* which was limited to the state's exercise of jurisdiction over the trespassory aspects of picketing that had not been the subject of

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17 Moreover, the court did not consider at all the controversy that "could have been, but was not, presented to the Labor Board." 436 U.S. at 197. That is, even if the conduct at issue is characterized as a unilateral change in conditions of employment based on the failure to afford respondents a hearing, it was either prohibited or permitted by Section 8(a)(5) of the Act. (*See* n.7, *supra.*) It could, therefore, have been presented to the NLRB if respondents had chosen to file an unfair labor practice charge explicitly contesting that action.

NLRB consideration. There, the Court reaffirmed the importance of the primary jurisdiction rationale, which "unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." 436 U.S. at 202. It declined, however, to extend that rationale to cases in which the party seeking to invoke state court jurisdiction "has no acceptable method of invoking or inducing [the other party] to invoke, the jurisdiction of the Board." *Id.* This is not such a case. To the contrary, this is a case in which the NLRB had, prior to the decision below, actually adjudicated the propriety of respondents' dismissals under the Act. (App. D at 19a and App. E at 21a)

This case is unlike *Sears* in several other critical respects. *Sears* involved conduct only arguably, not clearly protected or prohibited by the Act (436 U.S. at 187); the controversy before the state court was not the same as that which could have been presented to the NLRB (*id.* at 198); and the Court concluded that the state's exercise of jurisdiction did "not create a significant risk of prohibition of protected conduct . . ." (*id.* at 207). Thus, by implication, *Sears* reaffirmed that if the conduct at issue is clearly protected or prohibited by the Act, if the controversy presented to the local court is the same as that presented to the NLRB, or if there is a significant risk that the local court will interfere with protected conduct, the state's exercise of jurisdiction will not be permitted. Each of those factors is present in this case.

The conduct before the courts of Puerto Rico (dismissals for engaging in an unlawful strike) is the same as that which was before the NLRB and which the NLRB determined is protected by Section 8(d) from regulation. The controversy presented to the Puerto Rican courts (whether that conduct was lawful) is the same as that already decided by the NLRB. And, there is a clear conflict of remedies. All this the Court below apparently disregarded.

Implicit in the judgment of the Supreme Court of Puerto Rico is a view that the characterization of the action before it

as one "on contract" was critical.[18] That view was rejected by this Court in *Garmon* itself and again in *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 292 (1971), where the Court stated: "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." As *Lockridge* explained, cases involving alleged interference with employment relations present a "real and immediate" possibility of implicating principles of federal labor law, and therefore are preempted from consideration by the courts. 403 U.S. at 295-96. *See also Local No. 207, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Union* v. *Perko,* 373 U.S. 701, 705 (1963); and *Local 100, United Ass'n of Journeymen* v. *Borden,* 373 U.S. 690, 697-98 (1963).

The court below did not consider or balance the federal and state interests at stake here. Nor did it assess the potential interference with the federal regulatory scheme that might result from local regulation. Regardless how the conduct at issue in this action is defined, it is not a peripheral concern of the Act. Nothing is more central to national labor policy than the conduct of the parties in the course of collective bargaining, particularly when one of them engages in an unlawful strike.

Nor is the state interest apparently relied upon (albeit not mentioned) by the Supreme Court of Puerto Rico one that permits an exception to the preemption doctrine. The notion that a state's "interest in protecting its citizens' contractual rights," in and of itself, warrants an exception to the preemption doctrine was implicitly rejected in *Local 926* v. *Jones, supra,* slip op. at 5. In any event, even if such a local interest

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18 Respondents' action was not brought under Section 301 of the Act, 29 U.S.C. § 185, and involves no claim that the Foundation has breached a collective agreement. For that reason, the court below did not purport to construe or rest its decision on the terms of the collective agreement. *Smith* v. *Evening News Ass'n,* 371 U.S. 195 (1962), permitting the exercise, under Section 301 of the Act, of judicial power over conduct arguably prohibited or protected by the Act is, therefore, inapplicable. *Lockridge, supra,* 403 U.S. at 301.

were present, there is no absence of compelling congressional direction here, for Congress, in Section 8(d), has declared its intent with respect to the consequences of a strike in violation of that section—a loss of employee status.

The summary conclusion of the court below that "there was no substitution or novation of the [Statutes of the College] when the collective bargaining agreement was executed" (App. A at 3a) also reflects a fundamental misunderstanding of the bargaining process and federal labor law.

Upon the certification of the Association as the exclusive bargaining representative of the faculty members and the execution of the collective bargaining agreement, federal labor law became the source of the rights asserted by respondents in this action. By making the union the exclusive representative of employees, the Act "creates a power vested in the chosen representative to act in the interests of all employees." *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). The powers of the bargaining representative have been described by this Court as "comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ." *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944).

J.I. Case Co. v. *NLRB*, 321 U.S. 332 (1944), does not stand for the proposition for which it is cited in the judgment below. That case was decided before Section 8(d) or Section 301 of the Act was enacted, and before this Court's decisions in *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448 (1957) and its progeny. In relying exclusively on *J.I. Case*, the court below, in effect, ignored the enactment of the Labor Management Relations Act of 1947 (which, *inter alia*, made collective agreements in essence a federal specialty), and nearly four decades of carefully developed federal labor law.

The Court explained in *J.I. Case* that "[t]he very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and

serve the welfare of the group." 321 U.S. at 338. While acknowledging a potential "field for the individual contract," the Court expressly referred to "circumstances . . . in which there is no alternative" to the individual contract because the employer "may be under no legal obligation to bargain collectively . . ." (*id.* at 336-37) and to circumstances in which the collective bargain establishes only minimum terms of employment or "expressly [leaves] certain areas open to individual bargaining" (*id.* at 338). No such circumstances are present here.

Moreover, as this Court has held, individual bargaining is permissible only if engaged in with the consent of the employee representative. *Medo Photo Supply Corp.* v. *NLRB,* 321 U.S. 678 (1944). In any event, individual contracts may not "be used to limit or condition the terms of the collective agreement" and, whenever they "conflict with [the] functions [of the NLRB], they obviously must yield or the Act would be reduced to a futility." *J.I. Case Co.* v. *NLRB, supra,* 321 U.S. at 337.

III. The Decision Below Casts Into Doubt and Uncertainty the Scope and Force of the Labor Preemption Doctrine.

This Court has characterized the preemption doctrine as "one of the most teasing and frequently litigated areas of industrial relations. . . ." *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 241 (1959). *Lockridge* teaches that local tribunals must be given a "rule capable of relatively easy application" so that they can "largely police themselves" in dealing with these crucial concerns. 403 U.S. at 290. That there is a compelling need for further guidance from this Court was recognized last term when the Court granted *certiorari* to the Court of Appeals of the Commonwealth of Kentucky to consider the question whether the NLRA preempts a state court suit for damages brought by individuals who were hired to replace striking employees and later terminated pursuant to a strike settlement agreement approved by the NLRB. *Belknap, Inc.* v. *Hale,* No. 80-CA-1630-MR (Ct. of App. Ky.) (April 24, 1981), *cert. granted,* 50 U.S.L.W. 3998.01 (U.S.

June 21, 1982) (No. 81-1966). The reasons for granting the writ are even more compelling here.

In recognizing exceptions to the preemption doctrine, the Court has been careful to limit the scope of the exceptions to minimize the possibility of interference with the federal regulatory scheme.[19] For that very reason, the exceptions have not undermined the vitality of the doctrine. To the contrary, as the Court pointed out in *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 297 (1977), "they highlight [the court's] responsibility in [labor preemption cases] to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme."

In contrast, the court below did not conduct an inquiry into the nature of the federal and state interests at stake or the potential for conflict. Nor was it careful to limit the scope of the new exception that it created. To the contrary, it created a new, broad exception to the preemption doctrine—apparently available whenever there is a hiatus between collective bargaining agreements and an employee (including an illegal striker) can point to a procedure or policy that preexisted the collective agreement.

It also bears emphasis that, by permitting respondents to style their action as one under the laws of the Commonwealth (rather than a suit under Section 301 to enforce the collective agreement), the courts of Puerto Rico precluded petitioners from removing the action to federal court, thereby defeating petitioners' right to have the federal questions presented de-

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19 *See, e.g., Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53, 64-65 (1966) (holding that state libel suits would escape preemption only if limited to defamatory statements published with knowledge or reckless disregard of their falsity); and *Farmer* v. *Carpenters*, 430 U.S. 290, 305 (1977) (emphasizing that the state suit must "be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself").

cided in a federal forum. *Brough* v. *United Steelworkers of America*, 437 F.2d 748 (1st Cir. 1971); *Rivera* v. *Federacion de Musicos de Puerto Rico, Inc.*, 369 F. Supp. 1169 (D.P.R. 1974). Thus, the decision below will breed litigation in derogation of federal law and, if permitted to stand, effectively overrule this Court's decision in *Avco Corp.* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968).

Finally, if allowed to stand, the decision below will result in the introduction of disparity in a labor policy designed to be national in scope. Since *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), this Court has developed a body of federal substantive law for the enforcement of collective bargaining agreements. In those same decisions, the Court has made plain that questions concerning the interpretation and enforcement of such agreements must be "decided according to the precepts of federal labor policy." *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

If local courts remain free to apply local law to determine the validity of and enforce alleged individual contracts of employment where a collective agreement—which is a creature of and derives its vitality from federal labor law—governs the same employment relationship, federal labor law will be circumvented. And, the uniformity that this Court has declared to be essential will be destroyed.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

April 18, 1983

Appendix A—Judgment of the Supreme Court of Puerto Rico

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

No. O-82-362

Civil Action

ARSENIO E. SUÁREZ *et al.*,

Plaintiffs and appellees,

—v.—

FUNDACIÓN EDUCATIVA ANA G. MÉNDEZ, etc.,

Defendants and appellants.

JUDGMENT

San Juan, Puerto Rico, January 18, 1983

The professors, plaintiffs seeking performance of contract, who have been tenured by the Fundación Educativa Ana G. Méndez (Puerto Rico Junior College), are also members of a union governed by a collective bargaining agreement which was in force from November 1, 1975 to October 31, 1978. When the collective bargaining agreement came to an end, the Union (Asociación de Maestros Universitarios) went on strike on April 25, 1979, and when twelve days later (on May 7, 1979) they tried to return to work, the Fundación locked them out and sent them letters of dismissal because they had violated the Law.[1] The professors were summarily dismissed, without pre-

1 In the proceedings before the National Labor Relations Board (N.L.R.B.) it was found that they had violated the Taft Hartley Act because they had declared the strike without previous notice of their intent. The Fundación's conduct was also sanctioned and it was ordered to continue negotiating the bargaining agreement.

vious preferment of charges or hearing, despite the fact that the Statutes of the Junior College and the Faculty Handbook proscribe the removal of faculty members without first following an equitable procedure with full hearing in a session of record before the Academic Board or the Administrative Council. This guarantee was incorporated in the collective bargaining agreement. The dismissed professors filed a civil action seeking reinstatement to their jobs, and damages. The trial court ordered the reinstatement plus back pay from the date of the dismissal, plus $300 for each plaintiffs' attorney's fees. It did not grant the claim for moral damages.

Defendants filed a motion for reconsideration before this Court and on October 7, 1982, we issued the writ of review. On December 3, 1982, the case was taken under advisement after the parties' filing of briefs, answers, and rejoinders.

The Fundación, appellant herein, makes the following assignments of error: [1] [2] [5] To assume the jurisdiction that corresponds to the National Labor Relations Board; to rest to that effect on its interpretation of *Rivera* v. *National Life Insurance Co.*, 106 D.P.R. 517 (1977); and to create a new exception to the doctrine of preemption in labor matters; [3] to enforce the individual employment contracts, despite the fact that they were "novated" by the collective bargaining agreement; and [4] to disregard the doctrine of mitigation of damages upon ordering back pay.

[1] [2] [5] There is a notable difference between the action on contract filed with the Court, and the complaint filed before the N.L.R.B. for unfair labor practices (refusal to bargain the evaluations for tenure and other particulars), thus the Superior Court's intervention does not preempt the field reserved to the Board. To this effect, in *Sears Roebuck* v. *Carpenters*, 436 U.S. 180 (1978), the Court held:

> The critical inquiry is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is *identical* to or different from that which could have been, but was not, presented to the

> National Labor Relations Board, for it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the NLRB's unfair labor practice jurisdiction. . . .

Neither were the plaintiffs bound to exhaust the grievance procedure insofar as the Fundación dismantled said forum upon unilaterally abolishing arbitration.

The termination of the collective bargaining agreement did not necessarily abrogate the guaranties offered by the Statutes of the Junior College regarding faculty tenure. Some prior agreements subsist that are not incompatible with the collective bargaining agreement. *J. I. Case* v. *N.L.R.B.*, 321 U.S. 332. [3] These prior agreements—contained in statutes and regulations—that guaranteed fair treatment both to the Association's members and to nonunion personnel, are still in force with the basic protection given to *all*, thus there was no substitution or novation of the same when the collective bargaining agreement was executed.

[4] The trial judge erred in failing to recognize plaintiffs' obligation to mitigate the damages. *Fresh-O-Baking Co.* v. *Molinos de P. R.*, 103 D.P.R. 509, 520. "Our Act is remedial, not punitive. The petitioner is therefore entitled, as he argues, to deduct from the amounts due his employees any sums they earned from other employers for whom they worked during the period they were not employed by the petitioner because of the latter's unfair labor practices." *Rivera* v. *Labor Relations Board*, 70 P.R.R. 5, 13. The public interest in discouraging practices that are contrary to industrial peace requires a restoration of the situation, as nearly as possible, to that which would have prevailed if there would have been no discrimination. "Loss of pay shall be determined by deducting from a sum equal to that which [the employee] would normally have earned . . . during that period." *Labor Board* v. *Seven-Up Co.*, 344 U.S. 344, 345. *Phelps-Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177.

The judgment reviewed shall be modified only to order that the salaries, if any, earned by the plaintiffs from other sources

during their period of unemployment, be deducted from the corresponding back pay.

Thus modified, it shall be affirmed.

It was so decreed and ordered by the Court and certified by the Chief Clerk. Mr. Justice Rebollo López dissented without an opinion.

(Sgd.) Lady Alfonso de Cumpiano
Chief Clerk

[SEAL]

CHIEF CLERK'S CERTIFICATE

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the Judgment entered by this Court on January 18, 1983, in case No. O-82-362, *Suárez et al.* v. *Fundación Educativa Ana G. Méndez, etc.*, the original of which, in Spanish, is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 28th day of January 1983.

/s/ LADY ALFONSO DE CUMPIANO
Lady Alfonso de Cumpiano
Chief Clerk
Supreme Court of Puerto Rico

[SEAL]

[STAMPS]

Appendix B—Resolution of the Supreme Court of Puerto Rico

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

Appeal from the Superior Court, San Juan Part

No. O-82-362

Civil Action

ARSENIO E. SUÁREZ et al.,

Plaintiffs-appellees,

—v.—

FUNDACIÓN EDUCATIVA ANA G. MÉNDEZ, etc.,

Defendants-appellants.

RESOLUTION

San Juan, Puerto Rico, June 29, 1982

Since the appeal filed does not raise a substantial constitutional question, it is hereby dismissed for lack of jurisdiction.

Considering the appeal as a petition for review, it is hereby dismissed.

It was so agreed by the Court and certified by the Clerk. Mr. Justice Torres Rigual and Mr. Justice Rebollo took no part in the decision of this case.

(Sgd.) Lady Alfonso de Cumpiano
Chief Clerk

[SEAL]

Appendix C—Judgment of the Superior Court of Puerto Rico

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN PART

Civil No. 79-3270 (902)
Re: CIVIL ACTION

ARSENIO E. SUAREZ et al.,

Plaintiffs,

—v.—

FUNDACION EDUCATIVA ANA G. MENDEZ et al.,

Defendants.

SUMMARY JUDGMENT

Plaintiffs' and interveners' complaints[1] allege that they were summarily discharged from their employments as permanent

1 After the partial judgments of August 11th and 19th, and September 18, 1980, by which the claims of 17 of the plaintiffs professors were settled, the following are still plaintiffs and intervenors:

Arsernio E. Suárez	Lydia M. Alamo
Félix Rivera Resto	Edgardo Jusino
Flor E. Sáez	Luis Olivieri
Idsa E. Alegría	Vivian Roura
María Aneses	Ramón Luis Rivera
Marie E. Pérez Del Valle	Miguel Pereira Báez
Cruz Cosme	Alma Rodríguez
Héctor R. Sánchez	Bertha Gallego
Julia E. Rodríguez	Edith Faría
Carlos Arnaldo Meyners	Diana Ayguabibas

Defendant is Fundación Educativa Ana G. Méndez, Inc. (THE FOUNDATION) and as individuals and members of the Board of Directors of this entity: Manuel A. García Méndez, José F. Méndez, Juan M. García Passalac-

members of the Faculty of the Puerto Rico Junior College (PRJC) in an unjustified and arbitrary manner in violation of the statutes of said institution that require that charges be filed and a previous hearing be held. They claim reinstatement in their employment with all the economic rights and the corresponding prerogatives and compensation for moral damages allegedly suffered.

After a hearing was held on the motions for summary judgment filed by the parties, we shall set forth the established facts, the applicable law in relation to them and the applicable remedy.

I. ESTABLISHED FACTS:

Fundación Educativa Ana G. Méndez, Inc., manages and directs the educative entity Puerto Rico Junior College (PRJC), a non-profit institution devoted to the rendering of educative programs at college level. Plaintiffs have been professors of this college for more than five years, having acquired as such the status of permanent employees as it is acknowledged in the statutes and regulations of said institution.[2] They were all covered, as members of the Association of University Professors (THE ASSOCIATION), by the collective bargaining agreement between THE FOUNDATION and said association binding from November 1st, 1975 to October 31st, 1978.

Said collective bargaining agreement regulated certain aspects of the relations between the contracting parties. Matters relative to dismissal of employees were regulated or covered in detail by the statutes and regulations of the PRJC, in existence

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qua, Nydia Vélez de Ríos, Andrés Gómez, Guillermo Irizarry, Luis Collazo Pérez, Pedro Rivera Casiano, María Socorro Lacot, Rafael Rodríguez, Florencio Pagán Cruz, Armando Figueroa Toro, and Nelson Fernández Blasini. The complaint against Máximo Lenin, George Lyall, and Plinio Pérez Marrero was dismissed on June 12, 1979 through a partial summary judgment, as they had ceased to be directors of THE FOUNDATION.

2 These Statutes and Regulations, the last one in the form of a Manual—Puerto Rico Junior College Faculty Handbook—were approved by the Board of Directors of THE FOUNDATION in accordance with Art. VII, Sec. 2, of the Statutes of said Foundation.

and in force prior to said collective bargaining agreement. In this way, the provisions of the collective bargaining agreement that regulate the discharge of a teacher with tenure, make reference to the statutes of the Institution. Article VII, Section 8, of the Collective Bargaining Agreement states. "Once a teacher's tenure is granted, same may be revoke only for just cause and may be discharge from his employment *by the prior adherence to the procedure established in the statutes of the institution.*[3] (Emphasis supplied.)

Art. V Sec. 32 of the Statutes of the PRJC establishes the causes and procedure for the discharge of a teacher that has been tenured. In accordance with said section, faculty members may be tenured after five years of full time services to the institution and an approved evaluation under its rules and proceedings. It states as cause for the revocation of that permanency the violation of law or that conduct contrary to the moral standards generally accepted and seriously prejudicial to the institution, the neglect in the performance of his duties and inefficiency or incompetency.[4] But it also states that the resulting discharge will not be taken until the faculty member has been offered an opportunity for a hearing before the Academic Board or the Administrative Council in full or the committee they may designate, if the professor has not been offered the opportunity to be heard before the Board; and in that hearing, of which a magnetophonic or stenographic record will be kept, the teacher will have a right to be assisted by an advisor or counsel. In every case, it adds, the issue relative to the discharge will be determined by an equitable procedure, which guarantees the protection of the individual and institutional rights involved. As a final step in the proceeding followed, it is established that the Chancellor will transmit

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3 "In every case—adds, said article—the teacher against whom the action is taken, shall have a right to resort to the Grievance and Arbitration Procedure."

4 This section does not exclude other causes for discharge that, in the judgment of the Foundation, are valid, but always subject to the individual guarranties mentioned here on.

the decision taken to the President of THE FOUNDATION within the next 72 hours.[5]

The Faculty Manual establishes an analogous provision to that of Sec. 32, at pages 61 et seq; paragraph B(3) under the title "Instructors with Permanency" of Part III (Policy and Procedure). It specifically adds to the causes for discharge already mentioned, the physical incapacity to perform his teaching duties. It establishes that the procedure for revoking the permanency may not be started without the previous preferment of charges against the member before the Academic Board; and also, that it is the responsibility of the Administrative Council to ascertain that the affected Faculty member makes use of all his rights and privileges consistent with due process of law and the Statutes of the Institution.[6]

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5 We cite Sec. 32 of the Statutes of PRJC:

> SECTION 32—Faculty members may have tenure after five years of consecutive full time service to the College and a favorable evaluation under rules and procedures approved by the Administrative Council. Cause for the termination, by the Foundation, of the tenure of a faculty member by discharge shall consist of conduct seriously prejudicial to the College through infraction of law or commonly accepted standards of morality, neglect of duty, inefficiency, or incompetency. The enumeration of causes for discharge shall not be deemed exclusive and the Foundation shall retain the power to discharge a member of the staff or to refuse to renew a contract of employment for any cause which, in the judgment of the Foundation, may seem valid. *Such action will not be taken until the faculty member has had an opportunity for a hearing. If the faculty has not had an opportunity for hearing before the Academic Board, as contemplated in a preceding paragraph, then he shall be entitled to a hearing before the full Administrative Council or a committee of the Council, as the council may determine. At his hearing the faculty member shall have the privilege of being accompanied by an advisor or counsel and a full magnetophonic or stenographic report of the hearing shall be kept. In either case, the issue will be determined by an equitable procedure, affording protection to the rights of the individual and to the interests of the College.*" (Emphasis ours.)

6 Paragraph B(3) of the Faculty Manual states:

> 3. Revocation of Permanency. The following will be causes for the revocation of permanency of a faculty member:

In another similar provision, Art. V, Sec. 31, of said statutes provides that the Chancellor will not recommend the dismissal of any Faculty member after two years of services rendered, before the expiration of the term of his appointment; that he shall first present a written statement detailing the results of his evaluation or of the charges against him, enclosing a summary of the evidence that supports the evaluation or the charges presented. Sec. 31 adds that after the presentation of the evaluation or charges report, the faculty member shall have the privilege of a hearing before the Academic Board.[7] At that hearing, the faculty member may be assisted by counsel, a full magnetophonic or stenographic record of the hearing shall be kept and made available to the faculty member, a copy of the hearing report shall be transmitted to the President of THE FOUNDATION by the Chancellor within the next 72 hours.[8]

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a. Behavior that is seriously detrimental to the College through violation of a law or going against the moral criteria commonly accepted by society.

b. Proved incompetence or failure to perform his teaching duties.

c. Proved physical incapacity to perform his teaching duties. *The process of revocation of a permanency will not be initiated without a previous formulation of charges against the Faculty member before the Academic Board. The Administrative Council is the organism which shall have the responsibility of directing and executing the procedure that may bring about a decision in every case. The Council will ascertain that the affected faculty member makes use of all his rights and privileges, consistent with the due process of the law, and according to the established statutes of the College.* (Emphasis ours.)

7 According to Sec. 8 of Art. V of the Statutes of the PRJC, the Academic Board will have, among other functions, that of celebrating hearings for the faculty members. This Board will be composed, among others, by the Chancellor and Academic Dean. (At pages 17 and 37, respectively, of the statutes of the Faculty Handbook).

8 Section 31 states:

"SECTION 31—The Chancellor shall not recommend the dismissal of any member of the College Faculty after two years of service and being evaluated, before the expiration of the term of his contractual appointment. He should first present him a written statement detailing the results of the evaluation or the charges against him

When the Collective Bargaining Agreement came to an end, THE FOUNDATION, through its President, Mr. José F. Méndez, informed the plaintiffs by letter of November 17, 1978, the decision of the institution to deem as ended the applicability of the clause of the Collective Bargaining Agreement that provides the deduction of dues (Art. III, page 5 of the Collective Bargaining Agreement) and the suspension of the clauses regarding maintenance of the workshop (Art. II, page 3 of the Agreement) and of arbitration (Art. XXII, page 36 of the Collective Bargaining Agreement) with regard to the controversies arising after October 31st, 1978. He expressed his decision to continue enforcing the clauses related to the terms and conditions of work.[9]

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together with a summary of the evidence in support of the evaluation of the charges. *After the presentation of the evaluation report or the charges, the Faculty member shall have the privilege of a hearing before the Academic Board. At his hearing, the Faculty member shall have the privilege of being accompanied by an advisor or counsel. A full magnetophonic or stenographic report of the hearing shall be kept and made available at his request to the faculty member.* A copy of the hearing report shall be transmitted with any recommendation that the Chancellor may make to the President of the Foundation, within 72 hours." (Emphasis supplied.)

The Faculty Handbook has a similar provision in Section 31, pages 61 and 62.

9 We transcribe said letter:

"The Collective Bargaining Agreement between Association of University Professors (A.M.U.) and the Foundation having come to an end last October 31, 1978, we believe you should be kept informed of the effects that this has on your condition as members of the contracting unit. The expiration of the Agreement implies that the clause regarding the deduction of dues has ceased, as it is stated in Article III, page 5, of the Agreement. The Foundation is not obliged to continue deducting dues to the fellow professors of the appropriate unit that authorized it, as there is no collective bargaining agreement.

Therefore, we have instructed Mr. Isaías López Rivera, to discontinue said deductions of dues from the payroll corresponding to the month of November. Also, we proceded to notify it to Professor Carmelo Rodríquez, Secretary of the Association of University Professors (A.M.U.).

As additional information we indicate that the clauses regarding the Maintenance Workshop of the unit (Article II, Page 3.) and the

(Continue in next page.)

Afterwards the parties entered into conversations for the agreement of a new collective bargaining agreement. Nevertheless, these conversations did not prosper, and the relationship between management and union turned turbulent and they both filed charges of unfair labor practices against each other.

Among the incidents that took place during the period of those conversations was the institution's decision of deeming as suspended, beginning February 16th, 1979, the provisions of the Collective Bargaining Agreement regarding proffessors' evaluations. Notwithstanding, by effect of the ordinary meeting of the Institution's Academic Board of March 13, 1979, at which it recommended to the Administrative Council the renewal of said evaluations, the Council, at its meeting of March 20, 1979, unanimously approved this recommendation; it was sent to the consideration of the President of THE FOUNDATION for his final approval, which he gave later on. The evaluations of the professors with two years and for permanency continued in force starting March 21, 1979, according to the communication to that effect that by means of a memorandum the Chancellor Hiram H. Puig gave to the Faculty members of PRJC.

On April 25, 1979, when the conversations continued without success THE ASSOCIATION went on strike without the approval of the institution defendant, because the latter deemed that the strike was an illegal action under the established employer-employee relations.

On May 7, 1979, when the plaintiffs tried to come back to work, they were forbidden the entrance to the institution per instructions of THE FOUNDATION. Subsequently, all plaintiffs received the same dismissal letters "informing them that they were dismissed because they had violated or infringed the law." (Paragraph 11 of the complaint, admitted in the answer to complaint). Said dismissal of all plaintiffs was taken sum-

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9 (Cont.)

ones about the effectivity of the arbitration clause with regard to the disputes that may arise after October 31st, 1978, are suspended.

With regard to the terms and work conditions, these clauses are still in force.

marily. For the dismissals, they were not offered the opportunity of a prior hearing or any hearing at all.[10]

II. APPLICABLE LAW:

We conclude that under the statutes of PRJC and the provisions of the Faculty Handbook in which they were published, plaintiffs had a right of not being deprived of their employments without a previous hearing and preferment of charges.

The jurisdictional arguments of the defendants to prevent the intervention of this Court lack merit: (a) that plaintiff had the obligation to go to the grievance proceedings before coming before this Court. Resource to the grievance and arbitration proceeding presuppose the existence of a Collective Bargaining Agreement; only under the same do the reasons that support it make sense. In this case the agreement had come to an end. See SAN JUAN MERCANTILE CORP. v. J.R.T. 104 DPR 86. Independently, since the defendant institution considered that the arbitration clause had terminated as expressed in its letter to plaintiffs of November 17, 1978, it constituted a useless effort for plaintiffs to go through the grievance procedure, which is closely related to the arbitration proceeding as culmination of the grievance proceeding, when this cannot put an end to the debate or controversy; the arbitration proceeding became equally ineffective and therefore any action they would have attempted through it would have been useless.[11] It is a well-known rule that which provides

10 To question 19 of the interrogatories of December 13, 1980 about if it was offered "to the plaintiffs the right to be assisted by counsel in an administrative hearing", the President of THE FOUNDATION answered: "It never was requested by any of the plaintiffs."

Question 22 of the interrogatories of October 27, 1980, to all the members of the Board of Directors of THE FOUNDATION at which they were asked if at any meeting of the Board of Directors "it was mentioned the possibility to offer the discharged or dismissed professors the opportunity to defend themselves at administratives hearings," was answered in the negative.

11 The clause of the Grievance proceeding of the Agreement concludes thus: "(g) If the committee does not arrive at a decision by majority, the

that the exhaustion of administrative remedies may be disregarded when, among other things, the administrative action would be a useless and ineffective effort, and does not provide an adequate remedy. *Widow of Iturregui* v. *Commonwealth*, 99 P.R.R. 474, 477 (1970), and (b) that which holds that the issue in controversy corresponds to the jurisdiction of the National Labor Relations Board. The courts may entertain a claim filed against an employer by his employees claiming responsibility for conduct that does not include the violation of labor laws. *Rivera* v. *Security National Life Insurance Co.*, 106 D.P.R. 517.

What is before this Court is a civil action for non compliance with contractual provisions, as the one that refers to the violation of the Statutes of the PRJC that regulate the relations between that institution and plaintiffs; specifically the summary discharges of plaintiffs, expressly forbidden in said statutes. In no way does it detract from the course of action taken by plaintiffs, the fact that they do not concur with an employer as part of a labor syndicate, around a collective bargaining agreement. This does not transform the controversy into one related to labor laws, particularly to the Federal Labor Relations Law, which grants the National Labor Relations Board jurisdiction to entertain in the same.[12]

It is equally without merit defendants' argument alleging that when the collective bargaining agreement was signed on October 31, 1975, the provisions of the statutes of the abovementioned Institution were left without effect. Their force prevailed always since their approval in said statutes for all the PRJC employees, that is, before the effectiveness of the collective bargaining agreement, for non-union and for union employees under said agreement. With the arrival of the

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Association shall have ten (10) days to submit the case to arbitration pursuant to the provisions of Article XXII of this Agreement."

12 In the face of *Rivera, supra*, the charges of unfair labor practices filed both by the employer and by the plaintiffs' union, before the National Labor Relations Board in cases 24-CA-4133 and 24-CB-1053, do not alter this conclusion.

collective bargaining agreement their application prevailed for both groups of employees: to the non-union employees directly and to the union employees through the pertinent adoption of them by the collective bargaining agreement. With the expiration of the Agreement, said application also continued directly for the plaintiffs and the fact that the agreement expired does not mean that from that moment on the disposition regarding the discharge of the employees in their relation with their employer defendant will not be regulated. We are dealing here with labor-management statutory provisions that far from being substituted by the collective bargaining agreement in force, were kept intact; after it expired, a fair and reasonable analysis forces us to conclude that they did not lose their force. It is a well established rule that with the Collective Bargaining Agreement, all the prior provisions not inconsistent and unapplicable under it, shall stand. The Collective Bargaining Agreement will prevail over any other agreement between the employer and employee in conflict with it. J.I. CASE CO., v. N.L.R.B., 321 US 332 (1944).[13]

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13 The case of *J.I. CASE* discusses this legal principle; it states that other which it compares and by which any agreement that obstructs or contradicts the collective bargaining agreement, gives in to it. That is, the agreement may concur or coexist with any other agreement between the employer and the employee provided they complement each other; what the agreement cannot do is contradict the agreement because in that case, the labor agreement prevails. When the first thing happens, the agreement will be subsidiary to the bargaining agreement. To that effect, the *J.I. CASE* states: "Men may continue work after a collective agreement expires and, despite negotiation in good faith, the negotiation may be deadlocked or delayed; in the interim, express or implied individual agreements may be held to govern" (at page 767). "We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice (at page 768).

See, also, MARIO v. NORTH AMERICAN SOCCER (Sic) LEAGUE, 601 F.Supp. 633, 639-40 (1980); BAKER v. NEWSPAPER & GRAFFIC COMMUNICATION U., 628 F.2d 156, 160 (1980); KAILOR v. CROWN ZELLERBACH, INC., 643 F.2d 1362, 1367 (1981); AMERICAN ASSOCIATION OF UNIV. PROF. v. BLOOMFIELD COLLEGE, 322 A 2d 846, 847 (1974). This last case presents a situation similar to the case before our

(Continue. . .)

In this case, sec. 32 of the Statutes and Faculty Handbook established as causes for terminating the tenure of the faculty members, the violation of law or that behavior against the commonly accepted standards of morality, which seriously prejudice the institution; neglect of duty, inefficiency or incompetence and the physical incapacity to discharge the academic duties. Sec. 31 of the Statutes and the said handbook, together with Sec. 32 above mentioned, establish that the discharge of a faculty member will not take place without the prior preferment of charges and without affording the member an opportunity for hearing before the Academic Board or the Administrative Council, provided with a magnetophonic or stenographic record and at which the defendant will have the opportunity of being assisted by counsel; imposing upon the Administrative Council the responsibility to acertain that the affected member makes use of all his rights and privileges consistent with due process of law and the statutes of the Institution; and in every case, said dismissal shall be verified by an equitable procedure that guarantees the protection of the individual rights.

The above-mentioned provisions were not the creation of the Collective Bargaining Agreement but they were in force prior to it; they represent the guarantee of plaintiffs' fundamental rights. They were not in conflict with the provisions of the collective bargaining agreement, they complemented it, for the Agreement did not have the effect of displacing them, when it came into being much less when it expired. Such dispositions, that do not contemplate summary discharge, require the affirmative compliance by the defendant employer. When he ignored them completely, he incurred in a behavior that requires immediate reparation. See, in a similar application,

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13 (Cont.)
consideration. A syndicate of professors filed an action questioning the termination of the permanency. Notwithstanding the fact there was a collective bargaining agreement between the parties, the legal basis of the argument rested on a violation of the regulation contained in the Faculty Handbook relative to working conditions and permanency. It was decided that the dispositions of the collective bargaining agreement coexist with the regulatory dispositions of the institution since they were not incompatible.

HERNANDEZ v. HOSPITAL DEL MAESTRO, 106 DPR 72, 82.

III. THE APPLICABLE REMEDY:

Therefore, we resolve that the summary discharges of the plaintiffs and intervenors are null, we order the immediate reinstatement in their employments, the reinstatement of all their rights as Faculty members of the defendant Institution with tenure and the payment of backpay as of the date of discharge until the date of reinstatement herein ordered,[14] plus the legal interest on the amount of those salaries, from the date of this judgment and until they are satisfied. Rule 44.3(a) of Civil Procedure. We further impose the payment by defendant of costs and $300.00 for attorneys fees for each plaintiff.

TO BE ENTERED AND NOTIFIED.

Given at San Juan, Puerto Rico, this 29th day of April, 1982.

(Signed) ABNER LIMARDO
Superior Court Judge

14 The circumstances by which the motions for summary judgment were heard, suppose a presentation of all the basic particulars of the complaints. The ones that refer to moral damages were not established, therefore, the pleadings relating to them are dismissed.

CHIEF CLERK'S CERTIFICATE

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the present translation into the English language made by the interested party, has been checked and corrected as to its contents by the Bureau of Translations of the Supreme Court of Puerto Rico, and found to conform to the original Spanish documents mentioned below which appear of record in case No. O-82-362, *Arsenio E. Suárez et al.* v. *Fundación Educativa Ana G. Méndez et al.*, before this Court:

1) Sentencia Summaria—Summary Judgment of April 29, 1982.
2) Demanda—Complaint of May 24, 1979.

IN WITNESS WHEREOF, under the authority of Act No. 87 of May 31, 1972, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court, in San Juan, Puerto Rico, this 2nd day of August 1982.

/s/ LADY ALFONSO DE CUMPIANO
Lady Alfonso de Cumpiano
Chief Clerk
Supreme Court of Puerto Rico

By SIGNATURE ILLEGIBLE
Assistant Clerk

[SEAL]

[STAMPS]

Appendix D—Decision of the Regional Director of the National Labor Relations Board

[SEAL]

NATIONAL LABOR RELATIONS BOARD
Region 24
Room 591, U.S. Courthouse and Federal Building
Carlos E. Chardon Avenue, Hato Rey, Puerto Rico 00918
Telephone 753-4347

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

July 20, 1979

Re: Fundacion Educativa Ana G. Mendez
Cases Nos. 24-CA-4146 and 24-CA-4154

Asociacion de Maestros Universitarios
Condominio Olimpo Plaza 1201
Avenida Muñoz Rivera 1002
Rio Piedras, P.R. 00927

Gentlemen:

The above-captioned cases charging violations under Section 8 of the National Labor Relations Act, as amended, have been carefully investigated and considered.

Investigation of the above charges has failed to reveal evidence of a sufficient nature to support your allegation that the above-named employer violated Sections 8(a)(1), (3) and (5) of the Act by: conditioning further bargaining with your organization upon termination of a strike; locking out and/or refusing to reinstate 40 employees upon their offer to return to work on May 7, 1979 (24-CA-4146); and photographing strikers or refusing to deliver salary checks to striking employees (24-CA-4154). Rather, the investigation disclosed that on or about April 25, 1979 your organization commenced a strike against said employer for the purpose, in part, of obtaining

certain economic concessions in connection with the termination or modification of a collective bargaining agreement between your organization and the above-named employer, without first complying with the notice and waiting requirements of Section 8(d) of the Act. Under the provisions of that section, the strikers concerned lost their status as employees and therefor, the protection of Section 8(a) of the Act. Thus, the above-named employer was under no obligation to reemploy said strikers. *Mastro Plastics Corp.*, 350 U.S. 270; *Fort Smith Chair Co.*, 143 NLRB 514. Further, as the strikers' employment status lawfully terminated, the above-named employer did not, as alleged, violate Section 8(a)(5) of the Act by refusing to bargain with your organization or by unilaterally changing working conditions. *Fort Smith Chair Co., supra.* Finally, while the investigation did disclose that the above-named employer photographed certain strikers it did so for legitimate considerations relating to contemplated legal action to enjoin said strike. Accordingly, I am refusing to issue complaint in these matters.

You may obtain a review of this appeal by filing an appeal with the General Counsel in Washington, D.C. See Form NLRB-4938 attached herewith as to procedure for filing an appeal.

Very truly yours,

s/ MARTIN M. ARLOOK
Martin M. Arlook
Regional Director

Enclosures

c: General Counsel, NLRB, Washington, D.C. 20570
Data Processing, NLRB, Washington, D.C. 20570
Fundacion Educativa Ana G. Mendez, Inc., P.O. Box AE, Rio Piedras, P.R. 00927
Rafael Rodriguez Lebron, Esq., P.O. Box S-4826, San Juan, P.R. 00905
Juan F. Pagani, Esq., Calle Benito Feijoo #2044, El Señorial, Rio Piedras, P.R. 00926

Appendix E—Decision of the General Counsel of the National Labor Relations Board

[SEAL]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

September 28, 1979

Re: Fundacion Educativa Ana G. Mendez
Cases Nos. 24-CA-4146, 24-CA-4154

Juan Ramon Acevedo, Esquire
Escribano, Carreras, Acevedo,
Perez and Varela
Calle Mayaguez Num, 212, Apt. 3-B
Hato Rey, Puerto Rico 00917

Dear Mr. Acevedo:

Your appeal in the above-captioned matter has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of July 20, 1979.

Very truly yours,

John S. Irving
General Counsel

By S/ RONALD M. SLATKIN
Ronald M. Slatkin
Acting Director Office of Appeals

cc: Director, Region 24
Association de Maestros Universitarios, Condominio Olimpo Plaza 1201, Avenida Munoz Rivera 1002, Rio Piedras, Puerto Rico 00927
Fundacion Educativa Ana G. Mendez, Inc., P.O. Box AE, Rio Piedras, Puerto Rico 00928
Juan F. Pagani, Esquire, Calle Benito Fiejoo No. 2044, E. Senorial, Rio Piedras, Puerto Rico 00926

Appendix F—Decision and Recommended Order of the Administrative Law Judge

JD-70-82
Rio Piedras and
Cupey, PR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 24-CA-4133

FUNDACION EDUCATIVA ANA G. MENDEZ
D/B/A PUERTO RICO JUNIOR COLLEGE

and

ASOCIACION DE MAESTROS UNIVERSITARIOS

Case 24-CB-1053

ASOCIACION DE MAESTROS UNIVERSITARIOS

and

FUNDACION EDUCATIVA ANA G. MENDEZ
D/B/A PUERTO RICO JUNIOR COLLEGE

Graciela J. Belaval, Esq., for the General Counsel.

Daniel R. Dominquez, Esq. (*Laffitte & Dominquez*), of San Juan, PR; and *Juan M. Garcia Passalacqua, Esq.*, of Rio Piedras, PR; and *R. Rodriquez Lebron, Esq.*, of San Juan, PR; for the Respondent-Employer.

Juan R. Acevedo, Esq. (*Escribano, Carreras, et al.*), of Hato Rey, PR, and *Juan F. Pagani, Esq.*, of Rio Piedras, PR, for the Respondent-Union.

DECISION

Statement of the Case

RICHARD L. DENISON, Administrative Law Judge: This consolidated proceeding was heard in Hato Rey, Puerto Rico, on February 11, 12, 13, and 14, 1980. The consolidated complaint, issued August 3, 1979, alleges that Fundacion Educativa Ana G. Mendez d/b/a Puerto Rico Junior College, hereafter referred to as the Respondent-Employer, or the College, violated Section 8(a)(5) and (1) of the Act, on or about February 16, 1979 and thereafter, by failing and refusing to bargain in good faith with Asociacion de Maestros Universitarios, hereafter referred to as the Respondent-Union, or the Union. The complaint does not contain any allegation of "course of conduct" bad-faith bargaining or a lack of intention to reach an agreement.[1] Specifically, it is alleged that on or about February 16 the Respondent-Employer unilaterally terminated the existing faculty evaluation procedure governing probation, rank, and tenure, without prior notice to or bargaining with the Union, and thereafter refused and continues to refuse to discuss faculty rank and tenure. It is also alleged that from February 16 until May 11 the Respondent-Employer refused to discuss and negotiate with the Union concerning faculty probation. The complaint further alleges that from February 23 until March 9 the Respondent-Employer replied to a union proposal for dues checkoff by means of a counterproposal seeking a 20 percent service charge on the total amount of money collected by the College for checkoff purposes. In addition, it is alleged that on March 14 the Respondent-Em-

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1 At the hearing, consistent with the complaint, counsel for General Counsel disavowed any intent to proceed on the basis of a general bad-faith bargaining theory.

ployer bargained directly with unit employees and offered them a different and more advantageous medical plan than it had offered the Union during negotiations, which it thereafter withdrew on March 23 following the Union's acceptance. Finally, it is alleged that on March 21 the Respondent-Employer unilaterally reinstated the procedure for evaluating probation and tenure and on April 9 the procedure for evaluating faculty rank, which it had unilaterally discontinued on February 16, without prior notice to or bargaining with the Union.

Concerning the Respondent-Union, the complaint alleges that it violated Section 8(b)(3) and 8(d) by failing to notify the Federal Mediation and Conciliation Service and the Commonwealth of Puerto Rico Conciliation and Arbitration Bureau of the existence of a dispute, as required by Section 8(d)(3), and by engaging in a strike from April 25 until May 7 in furtherance of its expressed desire to terminate the collective-bargaining agreement and in furtherance of its demands.

The Respondents' answers, respectively, deny the allegations of unfair labor practices alleged in the complaint. Upon the entire record in the case, including my observation of the witnesses and consideration of the briefs, I make the following:

Findings of Fact

I. Jurisdiction

As alleged in the complaint and admitted in the answers, I find that the Respondent-Employer is, and has been at all times material herein, a non-profit foundation duly organized under, and existing by virtue of, the laws of the Commonwealth of Puerto Rico, where it is engaged in the operation of post-secondary educational institutions at Turabo, Puerto Rico, known as Colegio Universitario del Turabo; and at Rio Piedras and Cupey, Puerto Rico, known as Puerto Rico Junior College, the only educational institution involved in this proceeding.

During the year preceding the issuance of complaint in this matter, a representative period, the Respondent-Employer, in the course and conduct of its business, purchased and caused to be transported and delivered to its educational institutions goods and materials valued in excess of $50,000, which were transported and delivered in interstate commerce to said educational institutions directly from states of the United States. During the same period of time the Respondent-Employer derived gross revenues in excess of $1,000,000, exclusive of contributions, from the operations of said educational institutions. It is admitted, and I find, that the Respondent-Employer is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization

As alleged in the complaint and admitted in the answers, I find that the Respondent-Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices in Case 24-CA-4133

A. *Background*

The Respondent-Employer is a non-profit foundation which operates educational institutions, one branch of which is Puerto Rico Junior College. The Respondent-Union, originally certified by the Board on January 30, 1975 as collective-bargaining representative for the faculty employees of the College, had a 3-year agreement with Fundacion, which expired October 31, 1978. That agreement included provisions for evaluations of faculty members for release or retention following a probationary period, and governing the granting or denial of rank and tenure. It also contained a dues checkoff clause. Following the Union's July 28, 1978, request for the termination or modification of the contract, in September 1978, the

parties began negotiations for a new contract. At the outset of the negotiations the parties had agreed that each time agreement was reached on a particular clause, it would be initialed by the chief spokesman as no longer in issue, and tentatively agreed to subject to achieving agreement on a complete contract ratified by the Union's membership. The record reveals that this procedure was followed throughout the negotiations, even with respect to certain individual clauses originally contained in "package" or "global" proposals submitted by Fundacion. A hiatus in the collective-bargaining negotiations occurred, beginning November 17, 1978, when a decertification petition was filed with the Board, and ending with the re-certification of the Union on February 6, 1979.[2] Collective-bargaining sessions were held on February 14, February 23, March 9 and 23, and April 20 and 27. Strike authorization was voted by the Union's membership at a meeting on April 18. The Union's Board of Directors decided on April 21 to strike. The strike began on April 25. On April 27 Fundacion declined to negotiate further until the "illegal" strike ended.

Although the parties had exchanged contract proposals early in the negotiations and had met a few times in September, October, and early November 1978, when the negotiations reconvened on February 14 the Union's chief negotiator Federico Rivera Saez insisted that bargaining begin again because ". . . there had been some elections held." Fundacion's chief negotiator and labor relations consultant Raul Salgado expressed his surprise at this position, but nevertheless submitted a previously prepared "counterproposal" for the Union's consideration prior to the next meeting, which was set for February 23.

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2 Hereafter, all dates are in 1979 unless otherwise specified. The appropriate collective-bargaining unit is:

> All full-time teaching personnel employed by the Employer, Fundacion Educativa Ana G. Mendez, at its two Puerto Rico Junior College campuses located in Rio Piedras and Cupey, Puerto Rico; including instructors, associate professors, professors, Academic Counselors II, the Specialists in English, Spanish and Mathematics and athletic instructor/coaches.

B. *The Unilateral Discontinuance of Faculty Evaluations*

At the February 23 meeting Saez noted that Fundacion's proposal did not contain clauses governing evaluations for faculty rank, probation, and tenure. Salgado stated that the College was not going to negotiate on those clauses since they were not mandatory subjects of bargaining. However, no mention was made of the fact that Respondent Fundacion had actually discontinued evaluations on February 16; nor did the Union receive any official notice of this action until March 21 and April 9, respectively, when Chancellor Hiram H. Puig announced, by memoranda, their resumption. However, the College maintained its refusal to include evaluation procedure clauses in the new contract, on the ground that evaluation was not a mandatory subject for bargaining and was a management right, until the bargaining session on April 20, when it shifted its position.

At the April 20 meeting, in response to the Union's March 23 package proposal containing an evaluation clause, Salgado stated that Fundacion was willing to give the Union a proposal providing for deferral of the negotiations of the evaluation clause until the issuance and assessment of the United States Supreme Court's then pending decision in *N.L.R.B.* v. *Yeshiva University*, ____ U.S. ____; 103 LRRM 2526 (1980), which Respondent Fundacion had argued, and continued to assert, would be controlling concerning its obligation to bargain on this issue. However, no specific proposal along this line was given the Union at this meeting. The Union demonstrated its lack of interest in the suggested deferral arrangement by Saez' unavailability thereafter, despite his request at the end of the April 20 meeting that Salgado contact him no later than April 24.

I find that Respondent Fundacion's reliance on the *Yeshiva* case is misplaced. *Yeshiva* arose as the result of the University's post-election refusal to bargain concerning an initial contract with the certified union of a unit of full-time faculty members found appropriate by the Board. By means of this proceeding

Yeshiva obtained court review of the Board's unit determination in the representation proceeding reviewing its originally rejected contention that all of its faculty members were not employees within the meaning of the Act because they were managerial or supervisory personnel. The Board adhered to its unit finding, and ordered the University to bargain.[3] The Court of Appeals for the Second Circuit denied the Board's petition for enforcement of its Order, holding that the faculty had "managerial status" sufficient to remove them from the coverage of the Act.[4] The United States Supreme Court granted certiorari, and affirmed the Court of Appeals on the basis of the unique facts of the *Yeshiva* case, stating

> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.[5]

The instant case, in my view, is clearly distinguishable from *Yeshiva*. Firstly, unlike *Yeshiva,* which stemmed from a refusal to negotiate a first contract covering a contested unit, this case originates from negotiations arising from a previous collective-

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3 231 NLRB 597 (1977).

4 582 F. 2d 686 (1978).

5 103 LRRM 2526 at 2532.

bargaining contract covering an agreed upon faculty unit. Indeed, as counsel for General Counsel urges, Respondent Fundacion's answer, in the light of Section 9(a) of the Act, admits the appropriate unit allegation of paragraph 5 of the complaint.

Secondly, the issue presented herein is entirely different from that of *Yeshiva,* i.e., whether because of the Court's *Yeshiva* decision, and despite the inclusion of such clauses in the previous 3-year labor agreement, faculty evaluation for the purposes of probation, rank, and tenure, is a mandatory subject for bargaining. Fundacion contends it is not. I disagree since it is self evident that such evaluations are determinative concerning the question of retention or termination, in the case of probation, or attaining job security, in the case of tenure. Therefore, as such, they have the status of conditions of employment, which the Board has long held to be mandatory subjects for bargaining.

Finally, and most significantly, although the undisputed testimony of Chancellor Puig clearly shows that full-time faculty members have *participated* in the evaluation process through their faculty representatives at most all levels of the decision making process in various administrative and academic committees, boards, and councils, there was no evidence, offered by Respondent Fundacion in support of its affirmative defense, to show that Fundacion's faculty meets the Court's *Yeshiva* test for managerial employees, i.e., absolute authority in academic matters. To the contrary, the record does show that faculty representation in these forums is substantially in the minority, and, in addition, the Chancellor may reject their recommendations and the Foundation President may veto them.

I, therefore, find and conclude, for the reasons set forth above, that the Yeshiva decision is not controlling, and that evaluations of faculty members for purposes of probation, rank, and tenure is a mandatory subject for bargaining.

Since it is undisputed that Respondent Fundacion unilaterally discontinued these evaluations from February 16 until March 21 (probation and tenure) and April 9 (rank) and thereafter refused to bargain concerning the inclusion of an evaluation clause in the collective-bargaining agreement, I find

that Respondent Fundacion violated Section 8(a)(5) and (1) of the Act as alleged in paragraphs 8(a), (b), and (c) of the complaint.[6]

C. *The Alleged Bad-Faith Bargaining With Respect to Respondent Fundacion's Proposed 20 Percent Service Charge for Administering Dues Checkoff*

Respondent Fundacion's proposal of February 14, which was reviewed by the parties during the February 23 session, contained a provision, not included in the previous contract, establishing a 20 percent service charge for its role in processing employee dues checkoff deductions. Credited testimony by Raul Salgado reveals that during the ensuing discussions of this proposal Fundacion attempted to justify its position on the basis of its costs for administering the checkoff provision, although he was unable to locate any detailed discussion of cost in the minutes of the meeting. The Union countered that the College did not charge other institutions for making similar deductions. Apparently this argument was persuasive, for at the next meeting on March 9 Fundacion withdrew its demand for a service charge and the parties reached an agreement on the basis of the checkoff clause in the prior contract, which they later initialed on April 20 without further change.

I find that the General Counsel has failed to prove that Fundacion violated the Act by its conduct relating to the checkoff service charge proposal. The complaint does not allege that Respondent Fundacion engaged in a course of conduct designed to frustrate bargaining, or demonstrated a lack of intent to reach a final and binding agreement with the Union. Moreover, counsel for the General Counsel specifically disavowed such a broad theory of the case, and expressed an

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6 Since I have considered the restoration of the evaluation procedure on March 21 and April 9 as a factor in deciding that Fundacion bargained in bad faith during negotiations over this issue, I do not find the restoration of these procedures to be a separate unilateral change in violation of the Act as alleged in paragraphs 8(f) and (h) of the complaint.

intention to prove only the specific violations of Section 8(a)(5) specified. In any event, there is no evidence that the proposal was designed or itself tended to disparage or undermine the Union in the employees' eyes. When the negotiations reconvened on February 14, the College acceded to the Union's request that negotiations begin again. Fundacion gave the Union its written proposal, which was reviewed in the interim and discussed for the first time on February 23. That proposal contained the 20 percent service charge provision. The record does not reflect whether the subject of checkoff first arose in these talks on February 23 or at the next meeting on March 9, but it is clear that such a discussion occurred at one of those sessions and that the Union made a convincing argument, in voicing its objections, on the basis that Fundacion made deductions for others without charge. Thereafter, Respondent Fundacion did not insist on its service charge proposal, but instead promptly withdrew that clause at the March 9 meeting, and agreed on the basis of the clause in the expired contract. Under these circumstances, to find a violation of the Act here one must perceive the law to be that an employer commits a technical *per se* violation of the Act the minute he makes such a proposal, even where it is promptly withdrawn without insistence after hearing convincing arguments from across the table. In my view this is not the law. Thus, the Board has for some time expressed a disinclination to find *per se* violations. I find and conclude that Respondent Fundacion did not violate Section 8(a)(5) and (1) by including the service charge provision in its contract offer of February 14, as alleged in paragraph 8(d) of the complaint.

D. *The Bargaining Concerning Fundacion's Medical Plan Proposal*

The package counterproposal Respondent Fundacion orally submitted to the Union at the March 9 meeting contained a medical plan known as "Blue Cross Plan 1000." Under the provisions of this plan, as explained by credited testimony by Raul Salgado, the employee becomes eligible to enroll in the

plan at the first year of employment. From the beginning of second to the end of the fifth year Fundacion would pay only for the employee's coverage. Thereafter, following the faculty member's securing of tenure, Fundacion would pay for coverage for both the employee and his family.

The General Counsel alleges that following the March 9 meeting the College bargained directly with the unit employees, and in bad faith with the Union, by offering the faculty a better medical plan than it offered the Union in negotiations. It is also contended that Respondent Fundacion further violated the Act by withdrawing the allegedly better plan after the Union accepted that portion of the package proposal at the March 23 meeting.

The basis of the General Counsel's theory concerning the medical plan is the wording of a memorandum, stipulated into evidence, dated March 14, 1979 addressed to "members, contracting unit Puerto Rico Junior College" from Jose F. Mendez, President, setting forth the College's counterproposal. Item 5. of that summary states:

> Plan 1000, offered by Cruz Azul de Puerto Rico, with major medical, was offered. Concerning eligibility to join the plan, any person who has worked for a year or more is covered. Family plan will be obtained when tenure is obtained. The expenses of this plan are totally paid by the Fundacion.

However, the General Counsel's witnesses were unable, in the face of Salgado's assertion that the March 9 and March 14 medical clauses were one and the same, to recall what specific respects in the March 9 medical clause were different. Indeed, Union Secretary Rodriquez agreed they were "similar," while Idsa Alegria admitted that Plan 1000 was offered, but could not remember any details. She pointed to the last sentence of item 5 in the March 14 memorandum as the source of the Union's argument that two different proposals were offered, but could not explain in what manner.[7] I therefore find that the

7 Whether the Union's negotiators became confused by the sentence structure of item 5 in the March 14 memorandum, or by the differences in

General Counsel has failed to prove that Fundacion directly offered unit employees a better plan than was offered at the bargaining table. Therefore, in addition, Respondent Fundacion did not renege on any agreement at the March 23 meeting when the Union "accepted" the medical clause in the March 14 memorandum.[8]

I find that Respondent Fundacion did not violate Section 8(a)(5) and (1) of the Act as alleged in paragraphs (e) and (g) of the complaint.

IV. The Alleged Unfair Labor Practices in Case 24-CB-1053

On April 18 the Union held a meeting of its membership at which its Secretary General, Carmelo Rodriquez addressed those present. His topic was a review of the entire negotiations with a heavy emphasis on Fundacion's economic offers which he characterized as "minimum." Rodriquez then recommended strike action since the likelihood of Fundacion hiring replacements would be minimized by the proximity of examinations and graduation, affecting 7,000 students. He, therefore, expressed his opinion that the best time of strike was at hand. Then Idsa Alegria moved that the membership authorize the Union's board of directors to call a strike. A strike was authorized. Felix Rivera Resto, the Union's information and propaganda secretary was also authorized to issue a press release at the appropriate time.

On April 20 the parties met for the final time before the strike. According to Rodriquez at least 18 clauses were initialed by the parties as agreed to at that meeting. These clauses included the checkoff and medical clauses, which had been the subject of considerable dispute, and other substantive clauses relating to economics, hours, and working conditions. Total

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the meaning of "eligibility," "coverage," and "totally paid," is not clear in the record, and therefore any finding based on this possibility would be based on speculation.

8 On April 20 the parties reached agreement on the medical clause.

agreement on a contract was not achieved. Those items not agreed to included the evaluation clause for faculty probation, rank, and tenure; and other clauses about salaries, summer pay, yearly bonus, life insurance, pay for extra classes, Christmas bonuses, leave with pay, accident insurance, and the accumulation of vacation time per month.

On April 21 the Union's board of directors met and selected April 25 as the date for the commencement of the strike. A propaganda committee was formed under the direction of Professors Resto and Alegria which prepared a press release, published in *El Mundo* on April 24 stating that strike ". . . is due to the fact that the group is trying to negotiate a collective bargaining agreement . . . for the past nine months without success." The article also quoted Carmelo Rodriquez as announcing ". . . the strike would be of an economic type . . . ." In his testimony Rodriquez conceded it was "very possible" he told reporters that the strike would be of an economic nature. The strike began April 25. Pictures taken that day of picket signs show only economic captions, mainly expressing the faculty's desire for a pay raise. I, therefore, find, in accordance with the undisputed evidence, that the strike by the Respondent-Union began as an economic strike having as a purpose compelling the modification of the contract.[9]

The above findings concerning the legal status of the strike at its inception are relevant only in assessing the Respondent-Union's defense. It is admitted that the Union failed to comply with notice requirements set forth in Section 8(d) of the Act. However, Respondent-Union contends that it is excused from its failure to comply by Respondent Fundacion's unfair labor practices which, it argues, caused the strike. However, I have found that the strike was not caused by Respondent Funda-

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9 It is unnecessary for the purpose of deciding the issues in this case to decide whether or not the strike was thereafter converted to an unfair labor practice strike. I note that Cases 24-CA-4146 and 24-CA-4154, relating to that question and its affect on strikers who may have offered to return, are not before me by reason of a final decision by the General Counsel not to issue a complaint in those cases.

cion's unfair labor practices, but rather by economic circumstances. Moreover, Respondent Fundacion's unfair labor practices, described herein, do not stem from a rejection of the Union as majority representative and are not of such a flagrant nature as to otherwise excuse the Respondent-Union from compliance with Section 8(d) of the Act. Consequently, the holding of the United States Supreme Court in *Mastro-Plastics*, 350 U.S. 270, as reiterated by the Board in *Mrs. Fay's Pies, Inc.*, 145 NLRB 495, 497, cited by the Respondent-Union, is not controlling. Furthermore, as noted by counsel for General Counsel in her brief, the Board has held that strikes to compel a change in contract terms call for prior compliance with Section 8(d) even if the employer had not bargained in good faith concerning them, *Telephone Workers Union of New Jersey, Local 827, International Brotherhood of Electrical Workers, AFL-CIO (New Jersey Bell Telephone Company)*, 189 NLRB 726, 731; *Local 156, Packinghouse Workers (Du Quoin Packing Co.)*, 117 NLRB 670. I find and conclude that Respondent-Union violated Section 8(d) and 8(b)(3) of the Act as alleged in paragraphs 9, 10, 11, and 14 of the complaint.

Conclusions of Law

1. The Respondent-Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent-Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unilaterally terminating the existing faculty evaluation procedure governing probation, rank, and tenure on or about February 16, without prior notice to or bargaining with the Union, and thereafter refusing to bargain with the Union concerning the inclusion of an evaluation procedure clause in any agreement between the parties, the Respondent-Employer violated Section 8(a)(5) and (1) of the Act.

4. The strike of the Respondent-Employer's faculty members, which began on April 25, was not caused by the unfair labor practices of the Respondent-Employer and was, therefore, at its inception, an economic strike.

5. By engaging in a strike having as a purpose compelling a modification of the existing contract, without having first complied with the provisions of Section 8(d) of the Act, the Respondent-Union violated Section 8(b)(3) and (d) of the Act.

6. The Respondents did not violate the Act in any respects other than those specifically found.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I find it necessary to order that the Respondents cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since the Respondents' unlawful conduct has, in each instance, been limited to a single narrow and specific breach of their obligation to bargain in good faith, as opposed to a lack of intention to reach an agreement or engaging in a course of conduct designed to frustrate bargaining, I find that a narrow and specific order is appropriate. Furthermore, since the Respondent-Employer resumed utilizing the faculty evaluation procedure governing probation and tenure on March 21 and rank on April 19, an affirmative provision in the Order with respect to that issue is unnecessary.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

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10 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

A. The Respondent-Employer, Fundacion Educativa Ana G. Mendez d/b/a Puerto Rico Junior College, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Asociacion de Maestros Universitarios by unilaterally terminating or discontinuing existing faculty evaluation procedures governing probation, rank, and tenure without prior notice to or bargaining with the Union.

(b) Refusing to bargain collectively with the Union by refusing to negotiate concerning the inclusion of faculty evaluation procedures governing probation, rank, and tenure in a collective-bargaining agreement between the parties.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union concerning the inclusion of faculty evaluation procedures governing probation, rank, and tenure, and, if agreement is reached embody that understanding in a signed collective-bargaining agreement.

(b) Post at its premises at Rio Piedras and Cupey, Puerto Rico, in both the English and Spanish languages, copies of the attached notice marked "Appendix A."[11] Copies of "Appendix A," on forms provided by the

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11 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Regional Director for Region 24, after being duly signed by an authorized representative of the Respondent-Employer, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent-Employer to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondent-Employer has taken to comply herewith.

B. The Respondent-Union, Asociacion de Maestros Universitarios, its officers, representatives, and agents, shall:

1. Cease and desist from engaging in a strike or work stoppage having as a purpose compelling a modification of the existing contract, without first complying with the conditions prescribed by Section 8(d) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post, in the English and Spanish languages, in its offices and meeting halls, copies of the attached notice marked "Appendix B."[12] Copies of "Appendix B" to be furnished by the Regional Director for Region 24, shall, after being duly signed by an official representative of the Respondent-Union, be posted by it immediately upon receipt thereof and be maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent-Union and its agents to insure that such notices are not altered, defaced, or covered by any other material.

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12 See footnote 11.

(b) Forward to the Regional Director for Region 24 signed copies of "Appendix B," in the English and Spanish languages, for posting by the Respondent-Employer, if willing, at its Rio Pedras and Cupey, Puerto Rico, facilities where notices to employees are customarily posted.

(c) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondent-Union has taken to comply herewith.

Dated, Washington, D.C. February 20, 1981

s/ RICHARD L. DENISON
Richard L. Denison
Administrative Law Judge

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 24—CA—4133

FUNDACION EDUCATIVA ANA G. MENDEZ
d/b/a PUERTO RICO JUNIOR COLLEGE

and

ASOCIACION DE MAESTROS UNIVERSITARIOS

Case 24—CB—1053

ASOCIACION DE MAESTROS UNIVERSITARIOS

and

FUNDACION EDUCATIVA ANA G. MENDEZ
d/b/a PUERTO RICO JUNIOR COLLEGE

DECISION AND ORDER

On February 20, 1981, Administrative Law Judge Richard L. Denison issued the attached Decision in this proceeding. Thereafter, Respondent Employer and Respondent Union both filed exceptions and supporting briefs, and Respondent Employer filed an answer to Respondent Union's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided

to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

We agree with the Administrative Law Judge that Respondent Employer violated Section 8(a)(5) and (1) of the Act, first by unilaterally discontinuing evaluations for faculty retention (i.e., past the 2-year probationary period), tenure, and promotion, without prior notice to or bargaining with Respondent Union, and thereafter by refusing to bargain with Respondent Union about the inclusion of these subjects in the collective-bargaining agreement then being negotiated.

In doing so, we note that Respondent Employer's defense against the allegations of unlawful refusal to bargain is elusive. Respondent Employer did not allege in its answer to the instant complaint, as an affirmative defense against the allegations that it unlawfully refused to bargain with Respondent Union about evaluations, that the faculty was supervisory or managerial, and that Respondent Employer was thus not obligated to bargain with Respondent Union. Indeed, Respondent Employer admitted in its answer that Respondent Union was at all times material in this case the certified and recognized collective-bargaining representative for the instant full-time faculty unit; further, the record establishes that Respondent Employer did engage in continued productive bargaining with Respond-

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1 In affirming the Administrative Law Judge's finding that Respondent Employer violated Sec. 8(a)(5) and (1) of the Act by unilaterally terminating evaluations for faculty rank, probation, and tenure, without prior notice to or bargaining with Respondent Union, and by thereafter refusing to bargain about the inclusion of such evaluation procedures in the collective-bargaining agreement then being negotiated, we do not rely on the distinction drawn by the Administrative Law Judge between *N.L.R.B.* v. *Yeshiva University,* 444 U.S. 672 (1980), and the instant case. The Administrative Law Judge distinguished the two cases on the grounds that *Yeshiva* involved the refusal of an employer to negotiate an initial collective-bargaining agreement with a contested faculty unit, whereas the instant case involved the refusal of Respondent Employer to negotiate about the renewal of a part of an existing collective-bargaining agreement with a certified (pre-*Yeshiva*) faculty unit. These latter aspects of the instant case do not foreclose analysis of the managerial issue in this case under the framework for such analysis set forth in *Yeshiva.*

ent Union in negotiations over a new collective-bargaining agreement, and reached agreement with Respondent Union on many subjects.

Instead, Respondent Employer's argument concerning the supervisory or managerial status of the faculty appears to be confined to the faculty's participation in the evaluation process. Thus, Respondent Employer alleged in its answer to the complaint that "faculty rank and tenure not being mandatory subjects of bargaining under the Act . . . Respondent Employer did not violate the Act by refusing to bargain [about those subjects]." Later, in its opening statement at the hearing, Respondent Employer espoused a position which it described as "more limited than in *N.L.R.B.* v. *Yeshiva.*"[2] It asserted that the full-time faculty acts as both employer and employees with regard to evaluations for retention, tenure, and promotion, thereby rendering those items nonmandatory subjects of bargaining, and thus relieving Respondent Employer of any obligation to bargain about them. Finally, in its post-hearing brief to the Administrative Law Judge, Respondent Employer argues that in the areas of faculty evaluation for retention, tenure, and promotion the faculty acts in a supervisory or managerial way, and that, therefore, Respondent Employer is not obligated to bargain with Respondent Union about these subjects.

Thus, according to Respondent Employer in its brief to the Administrative Law Judge:

> In [Yeshiva] it was determined that there are *certain academic activities* in institutions of higher education where members of the faculty substantially participate in the institutional governance matters, and because of that fact, said faculty members and *said activities* are outside

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2 Opening statements in the instant proceeding were made on February 11, 1980, 9 days before the Supreme Court delivered its opinion in *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672. Thus, Respondent Employer's reference to "*N.L.R.B.* v. *Yeshiva*" is apparently to the underlying decision of the U.S. Court of Appeals for the Second Circuit, 582 F.2d 686 (1978), which was affirmed by the Supreme Court.

> the jurisdiction of the NLRB since the faculty acts as managers under the Act.
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> * * * * *
>
> It is our contention that in the specific activity of the granting or denial of evaluation, rank and tenure at Puerto Rico Junior College . . . the faculty of said college has substantial participation [in] that process and was exercising therein managerial functions, thus putting *the issue* outside the jurisdiction of the NLRB or of collective bargaining. It is Respondent's contention that [the] NLRB must refrain from exercising its jurisdiction in those *specific activities* in academia that encompass such a thorough participation of faculty and that its intervention would imply putting faculty "on both sides of the bargaining table. . . ." [Emphasis supplied.]
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> * * * * *
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> Where, as in the case at bar, management has reserved the right to grant or deny evaluation, rank and tenure and has delegated it to a group of faculty members acting in committee, a participatory model is in existence, the faculty is acting *in that specific activity* in a managerial capacity and NLRB intervention is not warranted by law.[3]

We specifically reject Respondent Employer's assertion that a faculty unit (or, for that matter, any appropriate bargaining unit) may be found to be supervisory or managerial only for certain aspects of wages, hours, and other terms and conditions of employment, but not for others. There is simply no warrant for the contention that a unit of employees can be an *appropriate* unit for bargaining about *some* aspects of terms and conditions of employment, while simultaneously being an

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3 Respondent Employer essentially adheres to this statement of its position in its brief in support of its exceptions to the Administrative Law Judge's conclusion that it unlawfully refused to bargain with Respondent Union about evaluation matters.

inappropriate unit for bargaining about *other* aspects of the employment relationship.

There certainly is no support to be found for Respondent Employer in either the Supreme Court's or in the Second Circuit Court of Appeals' opinions in *N.L.R.B.* v. *Yeshiva University*. Thus, contrary to the assertion of Respondent Employer, neither the court of appeals nor the Supreme Court determined that *certain academic activities* are outside the jurisdiction of the Act because the faculty acts as managers in regard to those activities. On the contrary, the court of appeals defined the issue as whether the full-time faculty were supervisors within the meaning of Section 2(11) of the Act or managerial personnel within the Board's definition of that term as adopted by the courts.[4] Indeed, far from determining that the faculty at Yeshiva University was supervisory or managerial for only specified aspects of terms and conditions of employment, the court of appeals noted that the supervisory and managerial authority of that faculty was "pervasive and consistently exercised."[5]

Nor did the Supreme Court, in affirming the court of appeals in *Yeshiva,* determine that *certain academic activities* are outside the jurisdiction of the Act. Indeed, the Court found that the Yeshiva faculty's authority in regard to *academic matters* was "absolute,"[6] and that the faculty's role in hiring, tenure, promotion, and termination was "predominant."[7] There was no attempt—or apparent inclination—on the part of the Court to sift out discrete aspects of the employment

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4 582 F.2d at 694-695. The definition of "managerial employees" referred to by the court is "those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267, 288 (1974).

5 582 F.2d at 695, fn. 10.

6 444 U.S. at 686.

7 *Id.* at fn. 23.

relationship in its determination that the faculty was managerial.

Nor did the Supreme Court, in reviewing the history of the managerial exclusion in *N.L.R.B.* v. *Bell Aerospace Co., supra,* expressly or impliedly raise the possibility of such bifurcated bargaining as proposed by Respondent Employer in this case. Thus, as stated, there is no warrant for a piecemeal application of the Supreme Court's holding in *N.L.R.B.* v. *Yeshiva University.* Rather, the managerial and supervisory exclusions are total exclusions from the coverage of the Act, applicable in all ways to all individuals within the group so denominated. These exclusions are decidedly not applicable to particular *bargaining subjects,* as Respondent Employer would have them apply to the faculty evaluation process in the instant case.

Moreover, we agree with the Administrative Law Judge's rejection of Respondent Employer's contention that the nature and extent of the faculty's involvement in the evaluation of individual faculty members establishes that the faculty is supervisory within the meaning of Section 2(11) of the Act, or managerial within the scope of the Supreme Court's opinion in *N.L.R.B.* v. *Yeshiva University, supra.* More precisely, we find that Respondent Employer has failed to establish its contention that the full-time faculty acts in a supervisory or managerial manner in the process of faculty evaluation.

The essential facts are as follows: According to the terms of the November 1, 1975–October 31, 1978, collective-bargaining agreement between the parties, new faculty members serve an initial 2-year probationary period. At any time during this period, the faculty member's employment may be terminated without the faculty member having any recourse to the contractual grievance and arbitration procedure. At the end of the 2-year probationary period, the faculty member is evaluated for possible retention. If this evaluation is not favorable, then, again, the faculty member's employment may be terminated without recourse by the faculty member to the contractual grievance and arbitration procedure. Faculty members who are retained beyond the 2-year probationary period are given annual appointments for their third, fourth, and fifth years of

service. Any actions taken by Respondent Employer which affect the employment status of a faculty member during the third-through-fifth-year period of service may be reviewed under the contractual grievance procedure.

Upon completion of 5 years of uninterrupted service, faculty members are evaluated for tenure. Tenured faculty members are evaluated for promotion through the ranks of assistant professor, associate professor, and professor.

Hiram Puig, Respondent Employer's chancellor, and, in that capacity, its chief administrative and academic officer, testified about the organizational structure of the school as it pertains to the evaluation process. According to Chancellor Puig, the "main legislative board" of the school is the Administrative Council, which has final authority over all administrative and policy matters, subject only to the veto of the president of the Fundacion. The Administrative Council has 13 members: the chancellor, five deans,[8] the "Title III" director,[9] three students (elected by the student body), and three faculty members (elected by the faculty).

Immediately below the Administrative Council is the Academic Board, described by Chancellor Puig as "a forum where all matters concerning the faculty and college are brought and discussed; and from where those matters go the [Administrative Council]." The Academic Board has approximately 26 members: the chancellor, the academic dean, the associate dean, the Institute directors,[10] and a faculty member from each Institute (elected by the faculty of that particular Institute).[11]

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8 Not further specified in the record.

9 Also not further specified in the record.

10 Institutes at the instant school are akin to academic departments. Although the record is not absolutely clear in this regard, there are apparently nine such Institutes: Business Administration, Education, English, Humanities, Natural Science, Nursing, Secretarial Science, Social Science, and Spanish. Each Institute has a director, akin to an academic department chairman. Institute directors are not included in the bargaining unit.

11 The Academic Board also acts as the school's Curriculum Committee, which convenes at the call of the chancellor. According to Chancellor

Below the Academic Board, with regard to evaluation of faculty members, is the schoolwide General Evaluation Committee, comprised of the academic dean, the dean of Learning Resources,[12] a representative of Respondent Union, and a faculty member.[13]

Finally, each Institute has an Evaluation Committee, comprised of the Institute director and two faculty members.[14]

Each faculty member being evaluated for retention upon completion of probation, for tenure, or for promotion is evaluated in three separate ways: by students, by the Institute Evaluation Committee (based on classroom observation), and by the General Evaluation Committee. The student and Institute evaluations are provided to the General Evaluation Committee, which itself prepares a separate evaluation of the faculty member's administrative performance, and then compiles an overall evaluation for that faculty member.

The overall evaluation compiled by the General Evaluation Committee is forwarded to the Academic Board, which in turn forwards it to the Administrative Council, with the Academic Board's recommendation in regard to whatever action is being considered (i.e., retention, tenure, or promotion). As indicated, the Administrative Council has final authority in such matters, subject only to the veto of the Fundacion's president.[15]

Puig, the Curriculum Committee has been convened twice during the 2½ years prior to the hearing.

12 Not further specified in the record.

13 The record does not indicate whether the faculty member on the General Evaluation Committee is elected or appointed to that position.

14 Associate Professor Idsa Alegria, Respondent Union's sub-secretary-general and a member of the faculty for 13 years, testified that one of the faculty members on the Institute Evaluation Committee is appointed by the Institute director, while the other is elected by the Institute faculty. However, Chancellor Puig testified that both of the faculty members on the Institute Evaluation Committee are elected to their positions.

15 Chancellor Puig testified that the president has never exercised his veto in this regard. Union sub-secretary-general and Associate Professor

All of the above-described evaluations are rendered in accordance with procedures proposed by the Academic Board, and approved by the Administrative Council, following preliminary consideration by a Special Committee of the Administrative Council comprised of two administrators, two faculty members, and two representatives of Respondent Union.[16]

Reviewing this evidence, we find that, while faculty members are elected to the Administrative Council and to the Academic Board, and serve, either through election or by appointment, on the schoolwide General Evaluation Committee and on the separate Institute Evaluation Committees, they are in the majority only on the separate Institute Evaluation Committees, have no more than an equal voice on the schoolwide General Evaluation Committee, and are in the decided minority on the Academic Board (9 faculty out of approximately 26 members of the Board) and on the Administrative Council (3 out of 13). Thus, as the evaluation of any particular faculty member ascends through the hierarchy of the evaluation process, the potential for effective faculty influence on the evaluation undergoes a corresponding decline. Moreover, this obvious progressive diminution of faculty influence in the evaluation process must also be considered in light of the fact that the only evaluation rendered by a committee with faculty majority, the Institute Evaluation Committee, is immediately diluted in the next step of the process, wherein the schoolwide General Evaluation Committee combines the Institute evaluation with the student evaluation, and its own evaluation, to compile an overall evaluation.

Thus, the *potential* for effective faculty influence in the overall evaluation process is markedly limited.

Alegria testified that not all probationary faculty members have been retained, and that not all faculty members are awarded tenure. However, Respondent Union's secretary-general, Carmelo Rodriquez, testified that he was not aware of any faculty member who did not receive tenure upon completion of 5 years of service. Also according to Rodriquez, no one had been evaluated for promotion in approximately 8 years.

16 Once again, the record does not indicate whether the faculty members on this Special Committee are appointed or elected.

Beyond that, the record fails to establish the *actual* nature and extent of specific faculty participation in the evaluation process, and the actual extent of faculty influence in the retention, tenure, and promotion of faculty members. In the absence of such factual underpinnings in the record before us, we cannot say, as the Supreme Court was able to say in *N.L.R.B.* v. *Yeshiva University*, that the faculty plays a "predominant role in faculty . . . tenure . . . termination and promotion."[17]

In these circumstances, we find that Respondent Employer has failed to establish that the instant faculty has the authority, in the interest of Respondent Employer, and exercised through the use of independent judgment, effectively to recommend the promotion, discharge, or reward of individual faculty members,[18] or that the instant faculty formulates and effectuates management policies in regard to faculty evaluations by expressing and making operative the decisions of Respondent Employer in the matter of faculty evaluations.[19]

Accordingly, we affirm the Administrative Law Judge's conclusion that Respondent Employer violated Section 8(a)(5) and (1) of the Act by unilaterally terminating the existing faculty evaluation procedures governing retention, tenure, and promotion, without prior notice to or bargaining with Respondent Union, and by thereafter refusing to bargain with Respondent Union about those procedures.

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17 444 U.S. at 686, fn. 23, Cf. *Ithaca College*, 261 NLRB No. 83, sl. op., pp. 5-6 (1982), and *Thiel College*, 261 NLRB No. 84, sl. op., pp. 17-18 (1982) (substantial evidence in both cases of effective faculty participation in and influence on decisions regarding tenure, termination, and promotion); *Duquesne University of the Holy Ghost*, 261 NLRB No. 85, sl. op., p. 7 (1982) (tenure awarded according to vote of tenured faculty).

18 See Sec. 2(11) of the Act, 29 U.S.C. Sec. 152(11) (supervisory status).

19 See, e.g., *N.L.R.B.* v. *Yeshiva University*, 444 U.S. at 682; *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. at 288 (managerial status).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent Employer, Fundacion Educativa Ana G. Mendez d/b/a Puerto Rico Junior College, Rio Piedras and Cupey, Puerto Rico, its officers, agents, successors, and assigns, and the Respondent Union, Asociacion de Maestros Universitarios, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. October 12, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix G—Complaint Filed in the Superior Court of Puerto Rico

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN SECTION

ARSENIO E. SUAREZ, FELIX RIVERA RESTO, CONCEPCION SANTOS, ADRIANA TOLEDO, ISIDRO A. VARGAS, FLOR E. SAEZ, ELIAS LOPEZ DE VICTORIA, ALMA LOPEZ DE VICTORIA, IDSA E. ALEGRIA, MARIA AÑESES, MARIA E. PEREZ DEL VALLE, CARMELO RODRIGUEZ, FERDINAND VELEZ, ANGEL SANTIAGO, ANGELA VALLEJOS, RUTH COSME, MARIA S. RODRIGUEZ, HECTOR R. SANCHEZ, JULIA E. RODRIGUEZ, EDGARDO L. MARTINEZ, CARLOS ARNALDO MEYNERS, LYDIA M. ALAMO, EDGARDO JUSINO, LUIS OLIVIERI, VIVIAN ROURA, JUAN F. PAGANI

Plaintiffs,

—v.—

FUNDACION EDUCATIVA, ANA G. MENDEZ INC. AND MANUEL A. GARCIA MENDEZ, JOSE F. MENDEZ, JUAN M. GARCIA PASSALAQUA, NYDIA VELEZ DE RIOS, MAXIMO LEVIN, ANDRES GOMEZ, GUILLERMO IRIZARRY, GEORGE LYALL, LUIS COLLAZO PEREZ, PEDRO RIVERA CASIANO, MARIA SOCORRO LACOT, PLINIO PEREZ MARRERO, RAFAEL RODRIGUEZ, FLORENCIO PAGAN CRUZ, ARMANDO FIGUEROA TORO, NELSON FERNANDEZ BLASINI

individually and as a members of the Board of Directors of the Fundación Educativa Ana G. Méndez, Inc.

Defendants

COMPLAINT

TO THE HONORABLE COURT:

COMES NOW plaintiff, through its undersigned attorneys and very respectfully states and prays:

1. That the plaintiffs are of legal age, University Professors and residents of the Commonwealth of Puerto Rico.

2. That the plaintiffs are professors of the Puerto Rico Junior College (PRJC), University Institution administered by the co-defendant, Fundación Educativa Ana G. Méndez, Inc., and have been faculty members of said College for more than five years, each one, having acquired the status of permanent instructors, in compliance with the Statutes, the Regulations regarding Rank and Promotions, the Faculty Handbook and the applicable regulations of the Puerto Rico Junior College.

3. That the co-plaintiffs Adriana Toledo, Isidro A. Vargas, Vivian Roura, Lydia M. Alamo, Maria S. Rodriguez, and Ferdinand Vélez, are professors of the PRJC, and have been faculty members of said College for more than two years, having been satisfactorily evaluated after their second year.

4. That the Fundación Educativa Ana G. Méndez, Inc., is the Corporation that operates, administers and directs the PRJC and the same is organized and incorporated and operates according to the Laws of the Commonwealth of Puerto Rico.

5. That defendants Manuel A. Garcia Méndez, José F. Méndez, Juan M. Garcia Passalaqua, Nydia Vélez de Rios, Máximo Levin, Andrés Gómez, Guillermo Irizarry, George Lyall, Luis Collazo Pérez, Pedro Rivera Casiano, Maria Socorro Lacot, Plinio Pérez Marrero, Rafael Rodriguez, Florencio Pagán Cruz, Armando Figueroa Toro, and Nelson Fernández Blasini, are members of the Board of Directors of Fundación Educativa Ana G. Méndez, Inc., and have the responsibility and duty, as individuals and as an organization, to direct, govern and make major decisions related to the

management, operation and functioning of the Puerto Rico Junior College.

6. That the Board of Directors of Fundación Educativa Ana G. Méndez, Inc. and/or said Foundation, approved the Puerto Rico Junior College's Statutes and the Faculty Handbook in force, which read, in its pertinent parts, as follows:

> Section 31—The Chancellor shall not recommend the dismissal of any member of the College Faculty after two years of service and being evaluated, before the expiration of the term of his contractual appointment. He should first present him a written statement detailing the results of the evaluation or the charges against him together with a summary of the evidence in support of the evaluation or the charges. After the presentation of the evaluation report or the charges, the faculty member shall have the privilege of a hearing before the Academic Board. At his hearing, the faculty member shall have the privilege of being accompanied by an advisor or counsel. A full magnetophonic or stenographic report of the hearing shall be kept and made available at his request to the faculty member. A copy of the hearing report shall be transmitted with any recommendation that the Chancellor may make to the President of the Foundation, within 72 hours.
>
> Section 32— Faculty members may have tenure after five years of consecutive full time service to the College and a favorable evaluation under rules and procedures approved by the Administrative Council. Cause for the termination by the Foundation of the tenure of a faculty member by discharge shall consist of conduct seriously prejudicial to the College through infraction of law or commonly accepted standards of morality, neglect of duty, inefficiency, or incompetency. The enumeration of causes for discharge shall not be deemed exclusive and the Foundation shall retain the power to discharge a member of the staff or to refuse to renew a contract of employment for any cause which, in the judgment of the Founda-

tion may seem valid. Such action will not be taken until the faculty member has had an opportunity for a hearing. If the faculty has not has (sic) an opportunity for hearing before the Academic Board, as contemplated in a preceding paragraph, then he shall be entitled to a hearing before the full Administrative Council or a committee of the Council, as the council may determine. At his hearing the faculty member shall have the privilege of being accompanied by an advisor or counsel and a full magnetophonic or stenographic report of the hearing shall be kept. In either case, the issue will be determined by an equitable procedure affording protection to the rights of the individual and to the interests of the College. After the decision by the Administrative Council, the record of the case shall be transmitted by the Chancellor to the President of the Foundation within 72 hours.

7. That the statutory provisions of the Puerto Rico Junior College establish the procedural right of every teacher, permanent or with more than two years, that has been satisfactorily evaluated, of not being deprived of his permanent teacher's status or on his way to becoming one, without due process of law and they establish the right, even in cases of infractions of law, to a hearing before the Academic Board and the Administrative Council prior preferment of charges, and the right to be assisted by counsel in said hearing, is also established.

8. That the provisions regarding Termination of Contracts and Revocation of Permanency, cited in the preceding paragraph 6, are in force and constitute an essential and integral part of the Employment Contract between the faculty members of the Puerto Rico Junior College, among them the plaintiffs, and Fundación Educativa Ana G. Méndez, Inc.

9. That on April 25, 1979, the plaintiffs, members of the Asociación de Maestros Universitarios (A.M.U.) participated in a strike against Fundación Educativa Ana G. Méndez, Inc., which the defendants classified as illegal, even in the absence of a final official determination by the National Labor Rela-

tions Board, organism that has said controversy before its consideration.

10. That on May 7, 1979, plaintiffs, previous written notice to Mr. José F. Méndez, decided to come back to work, unconditionally, so the students' academic semester would not be affected.

11. That when the plaintiffs tried to go back to work on May 7, 1979, they were informed by the Foundation, through Mr. Herminio Rodriguez, and at the front gate of the Cupey Campus, that they would not be permitted to enter. Subsequently, plaintiffs received letters informing them that they had been dismissed because they had violated or infringed the law.

12. That in the letters sent to the plaintiffs, informing them of their discharge, they were not informed of the rights they had under the Statutes and of other official documents of the Foundation and the PRJC, which have been cited in the preceding paragraph 6.

13. That having plaintiffs acquired the status of permanency and/or having taught at the Puerto Rico Junior College for more than two years and being satisfactorily evaluated, plaintiffs have acquired a property right upon their continuous employment, specifically regarding their right to teach according to their academic preparation and professional experience.

14. That defendants mentioned in the preceding paragraph 5, contributed, a priori and/or a posterior in an illegal, intentional, unjustified and arbitrary manner, and conspired to break, dissolve and terminate the contractual relation with plaintiffs, depriving them of their property, as far as their right to continue working is concerned, without due process of law, in violation of the Educative Institution's Standards and in violation of Section 7, Article II of the Constitution of the Commonwealth of Puerto Rico.

15. That the illegal and negligent acts of the Fundación Educativa Ana G. Méndez, Inc., and of the above-captioned co-defendants, mentioned in the preceding paragraph 5, when

they discharged and/or dismissed and/or refused to reinstate plaintiffs in their employments, have caused serious damages and mental, moral and/or physical sufferings to plaintiffs, who have not been able to pay their debts or comply with their economic obligations previously contracted and who have been affected and humilliated in their professional reputation, damages that are estimated in $14,000,000.00

16. That plaintiffs have a right to be reinstated in their employments.

17. That this court has full jurisdiction to entertain in cases of this nature.

WHEREFORE, it is respectfully requested, that this Honorable Court, upon the aforesaid facts, and upon the corresponding prior legal proceedings, finds for the plaintiff in the above case and order defendants, individually or collectively, jointly and/or severally, to reinstate plaintiffs in their employments with all economic rights and any other right attached thereto and to pay plaintiffs the sum of $14,000,000.00, costs, expenses and attorney's fees.

In San Juan, Puerto Rico, this 24th day of May 1979.

ATTY: s/ JUAN F. PAGANI RODRIGUEZ

ATTY: s/ EDGARDO L. MARTIN
2004 B. Feijoo St., El Señorial
Rio Piedras, Puerto Rico 00926
Tel. 775-1988

[SEAL]

Appendix H

ARTICULO VII

PERIODO PROBATORIO, EVALUACIONES Y RANGO

Sección 1:

Todo nuevo maestro al servicio de la Institución que posea el grado de Bachiller o B.A.+ recibirá un nombramiento de nueve (9) meses durante su primer año y de 10 meses durante su segundo año y años subsiguientes, hasta un máximo de cinco (5); excepto aquellos que sean nombrados por un semestre o menos en calidad de empleados temporeros o sustitutos.

Sección 2:

Todo nuevo maestro que ingrese al servicio de la Institución que posea el grado de Maestria en el área de especialidad o curos que se ofrecen dentro de su Instituto, recibirá un nombramiento por doce (12) meses desde su primer año de servicios; excepto aquellos que sean nombrados por un semestre o menos en calidad de empleados temporeros o sustitutos.

Sección 3:

Todo maestro nuevo al servicio de la Fundación pasa por un periodo probatorio inicial de dos (2) años. La Fundación podrá prescindir de los servicios del maestro durante los dos años de periodo probatorio inicial en cualquier momento sin recurso al trámite de Quejas y Agravios ni Arbitraje.

Sección 4:

Durante el segundo semestre del segundo año de servicio ininterrumpido a la Institución se hará una evaluación del maestro en base a un instrumento de evaluación aprobado por el Consejo Administrativo. Si el maestro no aprobare dicha evaluación, la Fundación quedará en libertad de dar por terminados sus servicios sin recurso alguno al trámite de Quejas y Agravios ni Arbitraje de este convenio.

Sección 5:

De aprobar la evaluación antes mencionada al maestro se le extenderán nombramientos anuales en su tercero, cuarto y quinto años. Cualquier acción que tome la Fundación que afecte el "status" de empleo de estos maestros durante los años tercero, cuarto y quinto y que no esté relacionada con el resultado de las evaluaciones, podrá ser llevada ante la consideración del Comité de Quejas y Agravios por el maestro y/o la Asociación.

Sección 6:

Durante el segundo semestre de su quinto año de servicios ininterrumpidos a la Institución el maestro que cumpla con el requisito de poseer la Maestria en su área de especialidad o cursos que se ofrecen en su Instituto será evaluado para la permanencia en base a un instrumento de evaluación aprobado por el Consejo Administrativo. Los que no aprobaren dicha evaluación y sean dados de baja de su empleo, podrán recurrir al trámite de Quejas y Agravios y Arbitraje de este Convenio.

Sección 7:

Aquellos maestros que al cumplir su quinto año de servicios ininterrumpidos a la Institución, no cumplieran con el requisito indispensable de poseer la Maestria en su área de especialidad o cursos que se ofrecen en su Instituto serán dados de baja de su empleo en la Fundación, sin recurso alguno al trámite de Quejas y Agravios ni Arbitraje establecido en este Convenio.

Sección 8:

Una vez otorgada la permanencia a un maestro, la *misma podrá ser revocada solamente por justa causa* y *por tanto podrá ser despedido de su empleo, previo el proceso establecido en los Estatutos de la Institución*. En todo caso, el maestro contra quien se tome acción, tendrá derecho a recurrir al trámite de Quejas y Agravios y Arbitraje.

Sección 9:

Todo profesor con permanencia puede aspirar al rango de *Catedrático Auxiliar*, si aprueba satisfactoriamente la evaluación de acuerdo al instrumento aprobado por el Consejo Administrativo y satisface los requisitos que apruebe el Consejo Administrativo.

Sección 10:

Todo Catedrático Auxiliar con dos o más años en este rango podrá aspirar al rango de *Catedrático Asociado* si aprueba satisfactoriamente la evaluación de acuerdo al instrumento aprobado por el Consejo Administrativo y satisface los requisitos que apruebe el Consejo Administrativo.

Sección 11:

Todo maestro que haya ostentado el rango de *Catedrático Asociado* por no menos de tres (3) años y haya obtenido el grado de Doctor en Filosofia (PhD) o en Educación (Ed.D) de una universidad reconocida, podrá aspirar al rango de Catedrático si aprueba satisfactoriamente la evaluación de acuerdo al instrumento aprobado por el Consejo Administrativo y satisface los requisitos que apruebe el Consejo Administrativo.

Sección 12:

Cuando surjan plazas nuevas o plazas vacantes presupuestodas de Catedrático Auxiliar, Catedrático Asociado o Catedrático, la Fundación circulará convocatorias al efecto. Las convocatorias incluirán los requisitos minimos aprobados por el Consejo Administrativo. Todo maestro que reúna dichos requisitos podrá radicar una solicitud en la Oficina de Personal *dentro* del término establecido en la convocatoria, para ser evaluado.

Sección 13:

Los instrumentos de evaluación serán preparados por un Comité Especial del Consejo Administrativo compuesto por

dos administradores del Puerto Rico Junior College, dos representantes de la facultad ante el Consejo, y dos delegados por la A.M.U., con voz y voto, para este propósito. La Junta Académica preparará una propuesta que será referida por el Consejo Administrativo al Comité Especial el cual la considerará en primera instancia, y rendirá un informe final al Consejo Administrativo sesenta (60) dias después de firmado este convenio. Dicho informe deberá ser aprobado o rechazado por el Consejo Administrativo dentro de quince (15) dias después de rendido. De no existir acuerdo dentro de estos términos, las evaluaciones serán realizados en base a los procedimientos existentes a la fecha de firma de este Convenio.

Sección 14:

El periodo probatorio para los Consejeros y/o Orientadores profesionales e Instructores Atléticos, será de tres (3) meses a la expiración del cual, si la Fundación desea retenerlo en su servicio, le extenderá el nombramiento correspondiente.

Durante el periodo probatorio, la Fundación podrá prescindir de los servicios del empleado sin recurso al trámite de Quejas y Agravios ni Arbitraje de este Convenio.

TRANSLATION

ARTICLE VII

PROBATIONARY PERIOD, EVALUATIONS AND RANK

Section 1:

Any new teacher at the service of the Institution who holds a Bachelor or B.A. + degree shall be granted a nine (9) month appointment during his first year and a 10 month one during his second and subsequent years up to a maximum of five (5); except those who are appointed for a semester or less in the capacity of temporary or substitute employees.

Section 2:

Any new teacher who joins the service of the Institution and who holds a Master's degree in the specialization area or courses offered within the Institute, shall be granted a twelve (12) month appointment since his first year of service; except those who are appointed for a semester or less in the capacity of temporary or substitute employees.

Section 3:

Any new teacher in the service of the Fundación goes through an initial *two (2) years probationary period*. The Fundación may, at any time, dispense with the teacher's services during the initial two year probationary period without recourse to the Grievance or Arbitration procedure.

Section 4:

An evaluation of the teacher shall be made during the second semester of the second year of uninterrupted services to the Institution on the basis of an evaluation instrument approved by the Administrative Council. If the teacher does not pass said evaluation, the Fundación shall be free to terminate his services without any recourse to the Grievance and Arbitration procedure contained in this agreement.

Section 5:

Should the above-mentioned evaluation be passed, the teacher shall be granted annual appointment during his third, fourth and fifth years.
Any action taken by the Fundación which affects the employment status of these teachers during their third, fourth and fifth years and which bears no relation to the results of the evaluations may be brought by the teacher and/or the Asociación before the consideration of the *Grievance Committee*.

Section 6:

During the second semester of his fifth year of uninterrupted services to the Institution, the teacher who meets the require-

ment of holding a Master's Degree in his area of specialization or courses offered at his Institute shall be evaluated for tenure on the basis of an evaluation instrument approved by the Administrative Council. Those who fail to pass said evaluation and are dismissed from their employment may resort to the Grievance and Arbitration procedure contained in this Agreement.

Section 7:

Those teachers who, upon completion of their fifth year of uninterrupted services to the Institution, do not possess the indispensable requirement of holding a Master's Degree in their area of specialization or courses that are offered at their Institute, shall be dismissed from their employment at the Fundación without recourse to the Grievance and Arbitration procedure established in this Agreement.

Section 8:

Once a teacher has been granted tenure, same may be revoked only for just cause and he may, for that reason, be discharged from his employment after process established by the *Institution's Statutes* has been followed. In any case, the teacher against whom action has been taken may be entitled to resort to the *Grievance and Arbitration procedure*.

Section 9:

Any professor with tenure may aspire to the rank of *Assistant Professor* provided he satisfactorily passed the evaluation based on the instrument approved by the Administrative Council and meets the requirements approved by the Administrative Council.

Section 10:

Any *Assistant Professor* with two or more years in this rank may aspire to the rank of *Associate Professor* if he satisfactorily passes the evaluation based on the instrument approved by

the Administrative Council and meets the requirements approved by the Administrative Council.

Section 11:

Any teacher who has held the rank of *Associate Professor* for less than three (3) years and has obtained the degree of Doctor of Philosophy (Ph. D.) or Education (Ed. D.) at a recognized university may aspire to the rank of Professor if he satisfactorily passes the evaluation based on the instrument approved by the Administrative Council and meets the requirements approved by the Administrative Council.

Section 12:

Whenever there are new or vacant budgeted Assistant Professor, Associate Professor or Professor positions, the Fundación shall circulate notices to that effect. Notices shall include minimum requirements approved by the Administrative Council. Any teacher who meets such requirements may file an application, in order to be considered, at the Personnel Office within period established in the notice.

Section 13:

Evaluation instruments shall be prepared by a Special Committee of the Administrative Council composed of two Puerto Rico Junior College administrators, two representatives of the faculty before the Council and two AMU delegates, with voice and vote, for this purpose. The Academic Board shall draw up a proposal which shall be referred by the Administrative Council to the Special Committee, who will consider it in the first instance and shall submit a final report to the Administrative Council sixty (60) days after the signing of this agreement. Said report must be approved or rejected by the Administrative Council within fifteen (15) days after its submission. If no agreement is reached within these terms, evaluations shall be made on the basis of existing procedures on the date of the signing of this Agreement.

Section 14:

Probationary period for Counsellors and/or professional Orientators and Athletic Instructors shall be three (3) months after the expiration of which, if the Fundación desires to keep them in its service, it shall give them the corresponding appointment.

The Fundación may dispense with the services of the employees without recourse to the Grievance or Arbitration procedure contained in this Agreement during the probationary period.

ARTICULO XXI

PROCEDIMIENTO DE QUEJAS Y AGRAVIOS

Sección 1:

Este procedimiento aplicará para la solución de cualquier controversia, queja o agravio que surja de una o más de las situaciones siguientes:

a. Cualquier disputa que surja entre las partes que se refiera a la interpretación o aplicación de este Convenio.

b. Cualquier querella de un empleado cubierto por este Convenio por un agravio, queja o reclamación surgida en el desempeño de su trabajo y que se relacione con alguna acción u omisión por parte de personal autorizado de la Fundación con base a las disposiciones de este Convenio.

Sección 2:

En todas las etapas de este procedimiento, el querellante tendrá derecho a estar asistido por un representante de la Asociación o por un abogado, si así lo considera conveniente.

Sección 3:

Toda controversia, queja o agravio deberá tramitarse dentro de y conforme a las etapas que se establecen a continuación:

a. Si un empleado cubierto por este Convenio tiene una querella, según se define en la Sección 1 anterior, discutirá el asunto acompañado de su delegado, o del Delegado General, si así lo desea, con el Director de Departamento u Oficina correspondiente, verbalmente o por escrito, a su opción, dentro de los dos (2) días laborables luego de haber surgido el incidente que dio origen a la querella. Dicho Director de Instituto u Oficina deberá contestar por escrito la querella dentro

del término de dos (2) días laborables luego de habérsele presentado.

Se el Director del Instituto u Oficina del querellante está ausente de su trabajo o por cualquier otra razón no está disponible para discutir el asunto, el querellante podrá recurrir a la siguiente etapa:

b. Si la querella no se resuelve en el paso anterior a satisfacción del querellante, éste a la Asociación, dentro de los dos (2) días laborables subsiguientes podrá elevar su querella por escrito ante el Comité de Quejas y Agravios, indicando en su comunicación al Comité el Artículo y Sección del Convenio que considera han sido violados.

c. El Comité de Quejas y Agravios consistirá de cuatro (4) empleados regulares de la Fundación y la Institución (los primeros dos seleccionados por la Fundación y los otros dos seleccionados por la Asociación).

d. Al recibir la querella el Comité por citación de cualquiera de sus miembros se reunirá y convocará a las partes envueltas en la querella para una vista a celebrarse dentro de los cuatro (4) días laborables siguientes. En dicha vista se concederá derecho a las partes para presentar la prueba que estimen pertinentes.

e. El Comité rendirá por escrito y bajo la firma de sus componentes su decisión dentro de los seis (6) días laborables siguientes a su última reunión y enviará copia a las partes envueltas.

f. Querellas que surjan con motivo del despido o suspensión del trabajo de un empleado cubierto por este Convenio se someterán por la Unión directamente al Comité de Quejas y Agravios dentro de los cinco (5) días laborables subsiguientes a la fecha del despido o suspensión del trabajo. Luego de recibir la querella, el Comité rendirá por escrito y bajo la firma de la

mayoría de sus miembros su decisión sobre el asunto dentro de los diez (10) días laborables subsiguientes. En caso de que el Comité ordene la reinstalación del empleado despedido o suspendido, dicha reinstalación se hará retroactiva a la fecha de despido o suspensión de empleo y la Fundación estará obligada a reembolsar al empleado los salarios que hubiere éste devengado, de no haber sido despedido o suspendido, incluyendo paga por concepto de clases extras, menos cualquier cantidad que el empleado hubiere percibido por concepto de otro empleo durante el período de despido o suspensión.

g. Si el Comité no llegara a una decisión mayoritaria la Asociación tendrá diez (10) días para someter el caso a arbitraje de acuerdo a las disposiciones del Artículo XXII de este Convenio.

TRANSLATION

ARTICLE XXI

GRIEVANCE PROCEDURE

Section 1: This procedure shall apply to the solution of any controversy or grievance that may arise from one or more of the following situations:

a. Any dispute arising among the parties in reference to the interpretation or implementation of this agreement.

b. Any grievance of an employee covered by this agreement arising from a complaint or claim originating in the performance of his work and that is related with an action or omission on the part of personnel authorized by the Foundation on the basis of the clauses of this agreement.

Section 2: In all steps of this proceeding the complainant shall have the right to be assisted by a representative of the Association or by a lawyer if he considers that convenient.

Section 3: All controversy or grievance shall be dealt with within and in accordance with the following steps:

a. If an employee under this agreement has a complaint as defined in the preceding Section 1, he shall discuss the matter accompanied by his delegate or the general delegate if he so desires with the director of his department or office, verbally or in writing, at his option, within two (2) working days after the incident that originated the complaint. Said institute or office director should answer in writing the complaint within the term of two (2) working days after it has been submitted to him.

If the institute or office director of the complainant is absent from his job or is not available for any other reason to discuss the matter, the complainant may proceed to the following step:

b. If the complaint is not solved in the previous step to the satisfaction of the complainant, he or the Association, within the next two (2) working days can appeal his complaint in writing to the Grievance Committee, indicating in his communication to the Committee the Article and Section of the agreement that he considers has been violated.

c. The Grievance Committee shall consist of four (4) regular employees of the Foundation and the Institute (the first two (2) selected by the Foundation and the other two (2) selected by the Association).

d. At the receipt of the complaint, the Committee by summons of any of its members shall convene and shall call the involved parties in the complaint to a hearing to be held within the next four (4) working days. At said hearing the parties shall be granted the right to present any proof they deem pertinent.

e. The Committee shall render its decision in writing and under the signature of its members within the six (6) working days following its last meeting and shall send a copy to the involved parties.

f. Complaints arising as a result of the termination or suspension of an employee covered by this agreement shall be submitted by the Union directly to the Grievance Committee within the five (5) working days following the date of the termination or suspension from work. After the receipt of the complaint, the Committee shall render its decision in writing and under the signature of the majority of its members within the subsequent ten (10) working days. If the Committee orders the reinstatement of the terminated or suspended employee, said reinstatement shall be retroactive to the termination or suspension date and the Foundation shall be obligated to reimburse the employee the salaries he would have earned, if he had not been terminated or suspended, including payment for extra classes, except any amount that the employee would have received from other employment during the period of termination or suspension.

g. If the Committee should not arrive at a majority decision the Association shall have ten (10) days to submit the case to arbitration in accordance with the terms of Article XXII of this agreement.

ARTICULO XXII

ARBITRAJE

Sección 1:

Si surgiera una disputa entre la Fundación y la Unión durante la vigencia de este Convenio en cuanto a:

1. el derecho laboral que lo rige,

2. la interpretación o alegada violación de cualquier disposición de este Convenio.

3. cualquier cuestión de hecho en relación con una alegada violación de los términos de este Convenio, o

4. referente a si un alegado agravio es o no arbitrable, cuya disputa no se hubiese resuelto mediante el procedimiento de Quejas y Agravios de este Convenio, las partes se obligan a que cualquiera de ellas someterá cualquiera de estos asuntos a arbitraje dentro de los diez (10) dias laborables a partir de la fecha de la decisión del Comité de Quejas y Agravios.

Sección 2:

A tales efectos, el árbitro será seleccionado de una lista que contenga los nombres de árbitros profesionales, preparada y aprobada de mutuo acuerdo por las partes, dentro de los treinta (30) dias subsiguientes a la firma de este Convenio. De la lista de nombres acordada se establecerá por sorteo el árbitro a quien le corresponda entender en el caso especifico y ningún árbitro podrá entrender en más de un caso consecutivo. Se le proveerá a cada árbitro en la lista una copia del Convenio.

Sección 3:

La parte promovente enviará al árbitro asi designado, con copia a la otra parte, el formulario mutuamente acordado para la radicación de querella a arbitraje que contendrá:

1. El inciso de la sección 1 de este Articulo en que se fundamenta la solicitud de arbitraje,

2. un breve recuento de los hechos y alegaciones que dan lugar a la solicitud, y

3. las cláusulas especificas del convenio que sean aplicables a su entender.

Sección 4:

El árbitro al que le corresponda el caso citará a las partes por escrito a una vista en que se discutirán los puntos levantados en el formulario descrito en la Sección 3 de este Articulo. La vista se iniciará dentro de diez (10) dias laborables de recibido por el árbitro el formulario de la parte promovente.

Sección 5:

El árbitro designado requerirá a las partes para que firmen un acuerdo de arbitraje o sumisión de las cuestiones a ser decididas por él.

Sección 6:

Ambas partes presentarán en dicha vista la prueba que posean para sustanciar o refutar, respectivamente, las alegaciones en el formulario de la parte promovente.

Sección 7:

El árbitro deberá rendir su decisión no más de treinta (30) dias a partir de la última vista del caso mediante notificación escrita a las partes.

Sección 8:

La decisión del árbitro será final, obligatoria e inapelable para el empleado, la Unión y la Fundación.

Sección 9:

Ninguna decisión del árbitro será a podrá ser retroactiva a una fecha anterior a la del evento o hechos que dieron origen a la queja o agravio.

Sección 10:

Los honorarios y gastos del árbitro serán compartidos por partes iguales por la Fundación y la Unión. Asi mismo, cualquier otro gasto inherente al caso será también compartido por partes iguales.

Sección 11:

El árbitro no tendrá facultad para adicionar, eliminar o enmendar parte alguna de este Convenio.

Sección 12:

El árbitro no tendrá jurisdicción para entender en acciones de salarios promovidos bajo la Ley Federal o la Ley Insular de Horas y Salarios.

TRANSLATION

ARTICLE XXII

ARBITRATION

Section 1: If a dispute should arise between the Foundation and the Union during the term of this agreement relating to: (1) the labor law, (2) the interpretation or alleged violation of any term of this agreement, (3) any matter of fact relating to an alleged violation with the terms of this agreement, or (4) any reference to the matter whether an alleged harm is or is not arbitrable, which dispute had not been resolved through the grievance procedure in this agreement, the parties commit themselves to submit any of these matters to arbitration within

the ten (10) working days subsequent to the date of the decision of the Grievance Committee.

Section 2: To that effect, the arbitrator shall be selected from a list containing the names of professional arbitrators, prepared and approved by mutual agreement of the parties, within thirty (30) days subsequent to the signing of this agreement. The arbitrator that shall entertain the specific case shall be chosen by lot from the agreed list and no arbitrator may entertain more than one consecutive case. Each arbitrator in the list shall be provided with a copy of the agreement.

Section 3: The petitioner will send to the thereby designated arbitrator, with a copy to the other party, the form mutually agreed for the submission of a complaint for arbitration, that shall contain: (1) the item of Section 1 of this Article in which the arbitration request is based, (2) a brief statement of the facts and allegations sustaining the request, and (3) the specific clauses of the agreement that in his opinion are applicable.

Section 4: The corresponding arbiter shall call the parties by writing to a hearing in which the points made in the form described in Section 3 of the this Article shall be discussed. The hearing shall commence within ten (10) working days of the receipt by the arbiter of the petitioner's form.

Section 5: The designated arbiter shall require from the parties the signing of an arbitration or submission agreement of the questions to be decided by him.

Section 6: Both parties shall present at said hearing the proof they may possess to substantiate or oppose, respectively, the allegations made in the petitioner's form.

Section 7: The arbiter shall render his decision no later than thirty (30) days after the last hearing date of the case in written notice to the parties.

Section 8: The decision of the arbiter shall be final, binding and unappealable for the employee, the Union and the Foundation.

Section 9: No decision by the arbiter shall or may be retroactive to a date previous to the event or the facts that originated the complaint.

Section 10: The arbiter's fees and expenses shall be shared in equal portions by the Foundation and the Union. Equally, any other expense inherent to the case shall be shared in equal portions.

Section 11: The arbiter shall not have the faculty to add, eliminate or amend any part of this agreement.

Section 12: The arbiter shall not have jurisdiction to entertain any salary actions promoted under federal law or under wage and hour insular legislation.

Appendix I

The relevant provisions of the National Labor Relations Act, as amended, are as follows:

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . . (29 U.S.C. § 157)

Section 8(a). It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title. (29 U.S.C. § 158(a))

Section 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * *

> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title. . . . (29 U.S.C. § 158(b))

Section 8(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. (29 U.S.C. § 158(d))

Section 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment. (29 U.S.C. § 159(a))

Section 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . . (29 U.S.C. § 160(a))

Section 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. (29 U.S.C. § 185(a))